The South China Sea Dispute: A Reappraisal in the Light of International Law

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A dissertation submitted to the University of Bristol
in accordance with the requirements of the degree of
Doctor of Philosophy in the Faculty of Social Sciences and Law.
School of Law, February 2008

92,723 words

ABSTRACT

The six-party dispute concerning the Spratlys in the South China Sea is complicated and has been unresolved for centuries. This thesis reappraises it in the light of international law with the aim of suggesting feasible solutions to the dispute.

The analysis of the thesis is based on the most reasonable and generous interpretation of Article 121 of the 1982 Law of the Sea Convention (LOSC) to the particular situation of the Spratlys resulting in 12 of 35 islands having potential to generate full maritime zones. Concerning the sovereignty issue, this thesis applies international law on territorial acquisition to analyse the strengths and weaknesses of the parties' claims. In line with most of the leading literature on this subject, the thesis identifies major weakness in the various claims. However, it considers Vietnam's claim to be the strongest in international law. Regarding the maritime issue, the thesis overcomes the difficulty of unresolved sovereignty issues by making hypotheses, so that a prospective maritime delimitation is mapped out under contemporary international law on maritime delimitation. This demonstrates that maritime rights generated from the Spratlys are not as great as expected by the parties, because the Spratlys' effect is limited to the remaining area that is left after giving full effect to the mainland of littoral states.

Based on the prospects of the sovereignty and maritime issues, the thesis recommends two feasible solutions. The first is unilateral submission to an arbitral tribunal under Annex VII of the 1982 LOSC, as applied in the *Barbados v. Trinidad and Tobago* case. Alternatively, diplomatic measures involving negotiation in good faith towards joint development may be the best option.

ACKNOWLEDGEMENTS

To my family
With Love and Gratitude

I would like to thank my parents and my husband who inspired me to write this thesis, encouraged me during all these years and offered me massive support. This thesis is devoted to them.

I would like to express my sincere thank to my supervisor, Professor Malcolm Evans, for his guidance and encouragement at all stages of this research. I am grateful to his comments and patience, for his understanding and valuable advice.

I am also grateful to many others. Among these are Professor Robert Beckman for his great support and comments during my field trip in the National University of Singapore; members of the Law Faculty of the University of Bristol; my fellow PhD students and the staff of the Wills Memorials Library for providing me all the necessary means for completing my research and an ideal working environment. Gratitude is also due to Hilary Sander for her English proof reading.

Financially, I am indebted to the Overseas Research Scholarship and Postgraduate Research Scholarship of the University of Bristol, which awarded me a full scholarship for my PhD in the UK.

AUTHOR'S DECLARATION

I declare that the work in this dissertation was carried out in accordance with the Regulations of the University of Bristol. The work is original, except where indicated by special reference in the text, and no part of the dissertation has been submitted for any other academic award. Any views expressed in the dissertation are those of the author.

SIGNED: 8 February 2008 *DATE:*

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ABBREVIATIONS

1982 LOSC	*1982 United Nations Convention on the Law of the Sea*
AJIL	*American Journal of International Law*
Am. U. Int'l L. Rev.	*American University International Law Review*
AYIL	*Australian Yearbook of International Law*
BYIL	*British Yearbook of International Law*
Cal. W. Int'l J.	*California Western International Law Journal*
Case W. Res. J. Int'l L.	*Case Western Reserve Journal of International Law*
CLCS	*Commission on the Limits of the Continental Shelf*
FAO	*Food and Agriculture Organization of the United Nations*
Harv. L. Rev.	*Harvard Law Review*
Hasting Int'l & Comp. L.R.	*Hastings International and Comparative Law Review*
ICJ	*International Court of Justice*
ICLQ	*International Comparative Law Quarterly*
IJECL	*International Journal of Estuarine and Coastal Law*
IJMCL	*The International Journal of Marine and Coastal Law*
ILQ	*The International Law Quarterly*
ILM	*International Legal Materials*
IMF	*International Monetary Fund*
Loy. L.A. Int'l & Comp. L.J.	*Loyola of Los Angeles International and Comparative Law Journal*
Melb J. Int'l L.	*Melbourne Journal of International Law*
NYIL	*Netherlands Yearbook of International Law*
Ocean & Coastal L.J.	*Ocean and Coastal Law Journal*
ODIL	*Ocean Development and International Law*
PCIJ	*Permanent Court of Justice*
RIAA	*Reports of the International Arbitration Awards*
San Diego L. Rev.	*San Diego Law Review*
SAYIL	*South African Yearbook of International Law*
Sydney L. Rev.	*Sydney Law Review*
Stan J, Int'l L.	*Stanford Journal of International Law*
Temp Int'l & Comp. L. J.	*Temple International and Comparative Law Journal*
Tex. Int'l L. J.	*Texas International Law Journal*
Tex. L. Rev.	*Texas Law Review*
UN	*United Nations*
UNCLOS	*United Nations Conference on the Law of the Sea*
Vand. J. Transnat'l L.	*Vanderbilt Journal of Transnational Law*

INTRODUCTION

1. General background of the dispute

The South China Sea[1] is of vital strategic and economic interest. As one of the largest semi-closed seas in the world, it is considered "a nexus of maritime routes,"[2] connecting the Indian and Pacific Oceans. Lessons from the past[3] suggest that the South China Sea has always played an important role in the security policy of littoral countries. Furthermore, the South China Sea possesses a diverse marine environment with rich resources of fisheries which are of great potential for economic and marine research activities. Also, the seabed of the South China Sea is well known for its considerable reserves of oil and gas fields. Located in the middle of such a strategic semi-enclosed sea, the Paracels and the Spratlys[4] can be used as stepping stones for littoral states seeking to grasp all of these advantages of the South China Sea. This situation creates the incentives for the various claims over the region.[5] Currently, there are two main issues concerning sovereignty and maritime rights in the South China Sea dispute. Five states and one entity, [6] namely, China, Vietnam, Malaysia, Brunei, the Philippines and Taiwan claim sovereignty over part or over all of the Spratlys. Vietnam and China also have an overlapping claim to the sovereignty of the entire Paracels. From the titles that they claim, there are likely to be overlapping maritime claims in the Spratlys and Paracels and between their waters and the maritime spaces of the mainland of littoral states in the South China Sea.

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[1] The South China Sea is the international name of the area. The author uses this name and other local names in this thesis in a neutral sense.

[2] Lim Teck Ghee and Mark J. Valencia (eds.), *Conflict over Natural Resources in South East Asia and the Pacific,* (Singapore: United Nations University Press, 1990), p.116.

[3] In the nineteenth century, both Vietnam and China were attacked by British and French's navy forces from the South China Sea; And during the World War II, Japan used the Spratlys as a military base to launch military attack to the Philippines.

[4] The archipelago has many local names in Southeast Asia languages, e.g. Nansha in Chinese, Truong Sa in Vietnamese and Kalayaan in the Philippines.

[5] Marwyn S. Samuels, *Contest for the South China Sea,* (New York and London: Methuen, 1982), p.4.

[6] The term 'entity' is used for Taiwan which has not been successful in establishing its statehood, but has relative independence in international relations. For further discussion, see *infra,* this introduction.

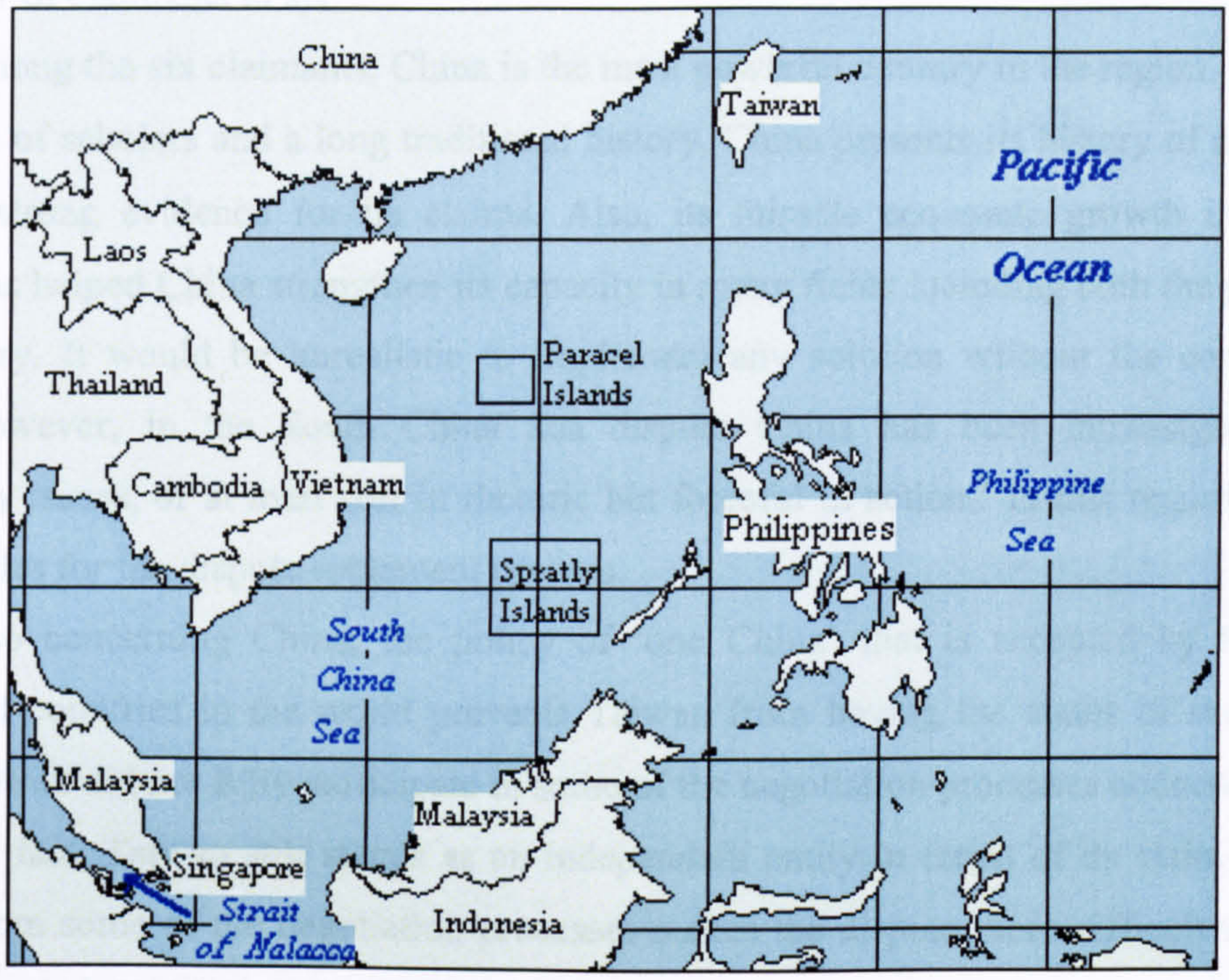

Figure 1. Simple map of the South China Sea area[7]

Similar to some other territorial and maritime disputes in formerly colonial areas, the South China Sea dispute has a long and complicated history. Before the presence of the Western colonial powers in the region, China and Vietnam exercised a maritime presence in the South China Sea. However, as international law, which was established by Western countries, was not introduced to the region at that time, maritime practices were limited to actual exploitation and usage of the water areas, not involving any statements or declarations concerning sovereignty. The late eighteenth century saw the establishment of colonial powers in the region, including Britain, France and Japan, all of whom made statements concerning sovereignty; however, at the end of the Second World War, all of them had withdrawn from the region with no clear official statement of the position regarding sovereignty over the Spratlys and the Paracels.

The ambiguous status of the Spratlys and Paracels after the San Francisco Conference in 1945 gave rise to escalating competition in claiming sovereignty. The bilateral competition between China/Taiwan and Vietnam expanded in 1956 to include the Philippines. Along with the development of the international law of the sea which increased

[7] Sources: Encarta World Alas, online at http://encarta.msn.com/map_701516645/South_China_Sea.html (accessed on 9 November, 2004).

the significance of islands, Malaysia and Brunei then also joined in the dispute, bringing the number of claimants to six.

Among the six claimants, China is the most powerful country in the region. With an abundance of scholars and a long traditional history, China presents its history of maritime usage as strong evidence for its claims. Also, its miracle economic growth in recent decades has helped China strengthen its capacity in many fields including both the political and military. It would be unrealistic to implement any solution without the consent of China. However, in the South China Sea dispute China has been intransigent over sovereignty issues, or at least soft in rhetoric but forceful in action.[8] In this regard, China sets obstacles for the dispute settlement process.

Also concerning China, the policy of 'one China' that is accepted by the vast majority of countries in the world prevents Taiwan from having the status of statehood. Hence, Taiwan did not fully participate in some of the negotiation processes concerning the dispute. In fact, Taiwan still stands as an independent entity in terms of its claim and its absence from some of the negotiation processes makes the dispute more difficult to solve since Taiwan's interests are marginalised.

Vietnam bases its claims on historical evidence and succession to the title from France. The strength of its legal claims also causes Vietnam to take a hard line approach towards sovereignty claims. This is also another obstacle to the settlement process of the South China Sea dispute.

Three other parties to the dispute, namely the Philippines, Malaysia and Brunei have built up their claim on the basis of specific elements of international law. The Philippines with its advantages from the provisions of the 1982 LOSC on archipelagic states is the closest country to the Spratlys. Hence, it relied on both proximity and its so-called discovery in 1956 to strengthen its claims. Malaysia and Brunei entered the dispute by virtue of the claim that some of the Spratlys' features are within their maritime areas according to the provisions of the 1982 United Nation Convention on the Law of the Sea (the 1982 LOSC). Although these claims are relatively weak, their physical presence coupled with an element of occupation makes the dispute yet more complicated.

Other historical developments in the twentieth century have further complicated the dispute. The cold war influenced this region and divided the countries by two invisible

[8] For further details, see *infra*, Chapter 3.

frontiers, China and Vietnam belonged to the communist side and the rest belonged to the capitalist side. This led to the indirect involvement of third parties to the disputes, namely the United States, Russia (the former Soviet Union) and Japan. This has worsened the dispute not only by adding complicated patterns of political influence, but also by diminishing the confidence of the parties.

Thus, it can be said that the ebb and flow of the regional history has made the dispute one of the most complicated and very difficult to solve.

Furthermore, for many years, the uncooperative attitude of the parties has also prevented the dispute from being solved. China, the most powerful among the claimants, chose a military route to consolidate its claims. This resulted in three military clashes in 1974, 1988 and 1995 between China and Vietnam and China and the Philippines. The military actions worsened the dispute and made other claimants vigilant regarding the threat from China to the security of the South China Sea region. They also destroyed the confidence among the parties and triggered an arms race in the region. After these military incidents, statistics showed that the military expenditure of Southeast Asian countries had increased significantly.[9] Instead of mobilising all available resources for economic development, mounting military expenditure of regional claimants created burdens for their state budgets and put regional security in danger. Moreover, although most countries drew on the international law of the sea as a basis for their claims (indeed they are parties to the 1982 LOSC), international law was not applied correctly in the South China Sea. For example, the parties fortified their claim by creeping occupation and built up artificial islands in an attempt to expand maritime areas, thus complicating the dispute. In addition, there is an absence of a binding dispute settlement mechanism in the region. Due to the strategic importance of the Spratlys and the weakness of their claims, none of the parties, except Vietnam is willing to submit the dispute to an international judicial institution.[10]

In the wake of such developments, many efforts have been made to involve China in the peace-settling process, urging self-restraint and seeking to build confidence among claimants. As a result, tension in the region has been defused, and no further serious military incidents have occurred. However, the dispute is far from being fully resolved.

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[9] For details, see Timor Kivimaki (ed.), *War or Peace in the South China Sea,* (Nias Press, 2002), Chapter 6 Part II, p.62.

[10] To be further discussed, *infra,* Chapter 5.

Negotiation is not effective as some of the parties such as China still maintain absolutist sovereignty claims.[11] Also, there exist many potential factors, e.g. the increasing demand for natural resources, especially for oil and gas, the impact of the interests of superpowers[12] and the strength of China, which individually or collectively have the capacity to put the South China Sea dispute back on the agenda of regional security. Hence, the South China Sea dispute is still at deadlock and one of the flashpoints for security concern in the world.

2. The emerging prospect of dispute settlement

Economic and security issues were major factors behind the dispute, but they could also bring parties together to solve the dispute. Economic development requires the consumption of natural resources which are available in the South China Sea and cooperation to solve the dispute is the only way to enable the parties to effectively exploit these resources. Also, focusing on economic development, peace and stability is of major importance and thus requires the parties to restrain themselves and to settle the dispute.

There has been much improvement in diplomatic relations among the parties concerned which creates a favourable environment for settling the dispute. The relics of the Cold War have been overthrown. Vietnam joined the Association of Southeast Asian Nations (ASEAN) in 1995. Laos, Cambodia, and Myanmar followed suit, resulting in the association having ten members. These new developments were of great importance in boosting economic cooperation. ASEAN currently is one of the most dynamic regions for economic development and plays the role of a junction for economic cooperation not only in Asia, but also expanding to Europe and Asia-Pacific.[13] Economic cooperation also brings about a more united Southeast Asia which is in a better position to bargain with a powerful China regarding the South China Sea dispute. Friendly relations were also seen between China and Southeast Asia countries. China is now their biggest commercial partner and this inter-dependent relationship helps all parties refrain from the use of force in the South

[11] Negotiation was initiated by Indonesia under a series of South China Sea Workshops, but China always insisted that the basis of negotiation was China's sovereignty to the entire Spratlys and the one China policy which excluded Taiwan from negotiation.

[12] The South China Sea provides vital navigation for imported oil tanks of Japan and is also of very importance in security policy in Asia-Pacific of the United States.

[13] A number of free trade agreements and economic forum were concluded, established and implemented recently between ASEAN and EU (ASEM), ASEAN and Asia-Pacific (APEC), ASEAN and South Korea and ASEAN and China. Others, namely the free trade agreements between ASEAN and India, ASEAN and Australia and New Zealand, ASEAN and Japan are under negotiation. For details, see the ASEAN website at http://www.aseansec.org/4926.htm (accessed on 15 August 2006).

China Sea dispute and offers scope for further cooperation. The South China Sea Workshops held in the 1990s represented an initial success in gathering the parties together to discuss their conflicting approaches to the dispute. Recently, the tri-party treaty among China, the Philippines and Vietnam on cooperation in the exploration of the hydrocarbon resources in an area of the Spratlys water demonstrates a positive signal regarding cooperation in an attempt to settle the dispute.

Besides the economic and security factors, the fact that China has become a major world power is another good sign for the dispute settlement process. In order to reach a position of a power, China should show the world that it is living up to its international obligations, thus building up its international prestige. The international law of the sea and dispute settlement in South China Sea are fields which China can utilise for these purposes.

In addition, the South China Sea is a natural marine ecosystem which can bring many benefits to the littoral states as well as problems if people over-exploit or improperly use it. Environment pollution, piracy and terrorism are such types of transboundary problems. To cope with them, there is no better choice for all littoral states than cooperation. The improving awareness of the issues by Southeast Asian countries also improves the prospect of the South China Sea dispute settlement.

Finally, more favourable signals for mapping out solutions for sovereignty and maritime disputes have emerged recently. Some complicated and long lasting maritime disputes have been solved successfully, e.g. *Jan Mayen (1986), Eritrea/Yemen Arbitration (1999), Qatar v. Bahrain (2001), Cameroon v. Nigeria (2002), Barbados v. Trinidad and Tobago (2006), Guyana v. Suriname (2007)* and *Nicaragua v. Honduras (2007).*[14] These

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[14] *Maritime Delimitation in the Area between Greenland and Jan Mayen,* Judgment, ICJ Reports (1993) p.34 (hereafter referred to as the *Jan Mayen* case); *The Eritrea-Yemen Arbitration Awards 1998 and 1999,* Permanent Court of Arbitration Award Series, (The Hague : T.M.C. Asser Press, 2005), (hereafter referred to as the *Eritrea/ Yemen Arbitration*); *Case Concerning Maritime Delimitation and Territorial Questions between Qatar and Bahrain, Judgment,* ICJ Reports, (2001) p.40 (hereafter referred to as the *Qatar v. Bahrain* case); *Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), Judgment,* ICJ Reports (2002) p.303 (hereafter referred to as the *Cameroon v. Nigeria* case); *Maritime Delimitation between Barbados v. The Republic of Trinidad and Tobago*, Arbitration Award, 11 April 2006 (hereafter referred to as the *Barbados v. Trinidad and Tobago* case), full text available at www.pca-cpa.org, *Maritime Delimitation between Guyana and Suriname,* Arbitration Award, 17 September 2007 (hereafter referred to as the *Guyana v. Suriname* case), full text available at www.pca-cpa.org, *Case Concerning Territorial and Maritime Dispute between Nicaragua and Honduras in the Caribbean Sea, Judgment,* ICJ Reports (2007) (hereafter referred to as the *Nicaragua v. Honduras* case), full text available online at www.icj-cij.org. One of the reasons for the parties making their claims to the Spratlys is their illusion that the archipelago will help to generate a large maritime area. With the new development of international law concerning maritime delimitation which evolved through the recent

cases mark new developments of international law regarding maritime delimitation which no doubt will be helpful for the case of the South China Sea dispute. Also, solutions for other maritime disputes in the region were reached; for example, the most recent and noticeable is the dispute between China and Vietnam in the Gulf of Tonkin in 2000. This lights up the hope that the solution of the South China Sea will be attained in the near future.

3. Literature review

As one of the most complicated disputes, the South China Sea has attracted the attention of many scholars. However, with regard to the two main issues of the dispute, namely the sovereignty and maritime claims, the literature only really focuses on the former. Also, as China has more written documents on this than any other claimant, much of the literature seems to take the subjective view in supporting the claims of China.[15] Others tend to point out the weaknesses of all of the claims in order to arrive at the conclusion that no one should prevail legally and thus the sovereignty issue is unlikely to be solved.[16] This is explained because of the difficulties in applying international law concerning territorial acquisition given the long and complicated history of the dispute.

With regard to the maritime issue, the literature seems to avoid addressing the substantive issue by assuming that the issue is too complicated due to the presence of hundreds of features of the Spratlys. Some of the literature suggests that the possible effect

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cases, maritime delimitation process of the South China Sea which is always assumed as too complicated to solve will be mapped out and results in much less influence of the Spratlys. This may help the parties to take less hard line positions on sovereignty claims and agree on a compromise solution for the dispute. For discussion on the influence from the development of international law on maritime delimitation through recent cases on the dispute, see *infra,* Chapter 4.

[15] For example, see Tao Cheng, "The Dispute over the South China Sea Islands" (1975) 10 *Tex. Int'l L. J.* 265; Richard D. Beller, "Analysing the Relationship between International Law and International Politics in China's and Vietnam's Territorial Dispute over the Spratlys Islands" (1994) 29 *Tex. Int'l L. J.* 293; Michael Bennett, "The People's Republic of China and the Use of International Law in the Spratly Islands Dispute" (1991-2) 28 *Stan J. Int'l L.* 425; H Harry L Roque, "China's Claim to the Spratlys Islands under International Law" (1997) 15 *Energy Natural Resources* 189; The-Kuang Chang, "China's Claim of Sovereignty over Spratly and Paracels Islands: A Historical and Legal Perspective" (1991) 23 *Case W. Res. J. Int'l L.* 339; Jianming Shen, "International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands" (1997-8) 21 *Hasting Int'l & Comp. L. R.* 1.

[16] See Brian K. Murphy, "Dangerous Ground: The Spratly Islands and International Law" (1995) 1 *Ocean & Coastal L.J.* 187; Gerardo M.C. Valero, "Spratly Archipelago Dispute: Is the Question of Sovereignty Still Relevant?" (1994) 18(4) *Marine Policy* 314; Valencia *et al.*, *Sharing the Resources of the South China Sea,* (London, The Hague, Boston: Martinus Nijhoff Publishers, 1977); Odgaard, *Maritime Security between China and Southeast Asia: Conflict and Cooperation in the Making of Regional Order,* (Ashgate, 2002).

of the Spratlys under Article 121(3) should be ignored in order to simplify the maritime issue.[17]

From the conclusion that the dispute is unresolvable if the parties maintain their absolutist sovereignty claims, the scholars attempt to find a solution for the dispute by calling for the freezing of sovereignty and suggesting the applicability of some joint development models, namely the Timor Gap, Antarctica and Svalbard models.[18]

So far, none of the suggestions have come to pass. This may be explained by the belief of the parties that the claims over the features of the Spratlys will allow them to control large areas of maritime zones. The more features they claim, the greater the maritime zone. Thus, the suggested approach of simply shelving all sovereignty claims and considering all the features of the Spratlys as having no effect would not persuade the parties of a better benefit than what they thought they would have. In that context, a well structured organisation for joint development along the lines suggested in some models remains elusive.

4. The purpose and structure of the study

Given the emerging prospect of the dispute moving towards a possible solution in the future and taking into account the limitations of the literature so far, this thesis would like to bring a new understanding about the dispute through analysis of the legal aspects of the two issues under dispute, namely sovereignty and maritime rights. With regard to the sovereignty issue, this thesis agrees with the majority of the literature that the parties to the dispute have many weaknesses to their claims. However, by applying international law concerning territorial acquisition, the legality of the claims is analysed and the strongest claims are identified. This finding reveals that the South China Sea dispute is not at deadlock because of the weaknesses of all of the claims and the complicated history of the

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[17] Valencia *et al., ibid.* Article 121(3) provides the limitation for islands which are only have internal water and territorial sea. For further discussion on this issue, see *infra,* Chapter 2.

[18] Valencia *et al., ibid;* Valero, *op.cit.,* note 16; Charles Liu, "Chinese Sovereignty and Joint Development: A Pragmatic Solution to the Spralty Islands Dispute" (1996) 18 *Loy. L.A. Int'l & Comp. L.J.* 865; Wei Cui, "Multilateral Management as A Fair Solution to the Spratly Disputes" (2003) 36 *Vand. J. Transnat'l L.* 779; Kuang-Ming Soon, "Free the Tropical Seas: An Ice-cool Prescription for the Burning Spratly Issues" (1996) 20(3) *Marine Policy* 199; Chistopher C. Joyner, "Toward a Spratly Resource Development Authority: Precursor Agreements and Confidence-Building Measures", Paper presented at the Conference on "Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation" at UN Plaza- Park Hyatt Hotel, New York, on February 7-8, 1997 and Lian A Mito, "The Timor Gap Treaty as A Model for Joint Development in the Spratly Islands" (1998) 13 *Am. U. Int'l L. R.* 727.

dispute, as most scholars assume. Instead, sovereignty issues may be resolved if there is a suitable dispute settlement mechanism. The sovereignty claims and current occupation by the parties will be advanced in the analysis regarding maritime issue. The thesis will examine the maritime issue in the most complicated scenario for maritime delimitation by identifying the maximum effect of the Spratlys in the maritime delimitation with littoral states. The thesis will clarify that the possibility of obtaining advantage by claiming the Spratlys will not be as great as expected by the parties. The Spratlys will not have the effect of reducing the maritime zones generated from the entitlement of the mainland of littoral states. They only have the effect of generating maritime zone in the area after giving full effect to the mainland of littoral states.

Based on the prospect of resolution of the sovereignty and maritime issues, the thesis will examine feasible solutions to the South China Sea dispute. The thesis suggests that diplomatic measure, in which negotiation in good faith may be the best option. In this case, based on the limited effect of the Spratlys in maritime delimitation and the unresolved sovereignty issue, maintaining sovereignty claims cannot actually benefit the parties as much as they thought. Instead, the thesis suggests that the more effective approach for everyone would be negotiation towards a comprehensive joint development regime in order to both protect the environment and benefit from economic interests in a sustainable way. This may also be the way to shelve this long and complicated dispute when no other dispute settlement mechanism is available. However, taking into account that joint cooperation is not a novel topic as many scholars suggested, so far, none of the suggestions have come into effect. Hence, the thesis takes this opportunity to examine state practice in joint development. Based on this analysis and taking into account the particular situation of the South China Sea region, the thesis arrives at a suitable and feasible regime.

In order to achieve this, the thesis will consist of five chapters. Introducing the background to the legal analysis in the later chapters, Chapter 1 (Introduction to the South China Sea) begins with the presentation of some facts and figures on the dispute in the South China Sea and the Spratlys, from both the geographical and geomorphologic perspective. Due to its geographical characteristics, the South China Sea is of strategic importance for navigation and security and it is also a source of great economic potential for littoral states. The natural resources in the South China Sea include fisheries, hydrocarbon resources and a diverse marine environment in a semi-enclosed sea. Lying in

the middle of that sea, the Spratlys are central to its strategic position and have therefore become a source of dispute.

Based on the geographical and geomorphologic situation introduced in the earlier chapter, Chapter 2 (The Legal Regime of the Spratlys) moves towards legal analysis of the legal regime of the Spratlys. Following Article 121(1), the chapter will list the features which are above water at high tide and thus are islands and eligible subjects for sovereignty claims. Then, the chapter considers the vagueness of Article 121(3) of the 1982 LOSC and applies that Article to the Spratlys in order to identify which of the features can generate extended maritime zones for the Spratlys. The chapter also examines the legal regime and impact of other features - low tide elevations, reefs, rocks and islands - which do not qualify under Article 121(3). Based on the impact of all features according to their legal status, the maritime spaces for the entire Spratlys will be mapped out. This gives the basis for analysis of sovereignty and maritime issues in the next two chapters.

The legal perspectives of the sovereignty issues will be examined in Chapter 3 (Legal perspectives on the sovereignty issue relating to the Spratlys: An Historical Approach). The chapter will analyse the legal arguments of the parties' claims through a chronological historical development of the dispute. The analysis will be achieved by applying the international law concerning acquisition of title to territory in order to point out the strengths and weaknesses of the parties' claims. The chapter will end with the identification of the strongest claim in the dispute and statistics on the current occupation by the parties on the features which are eligible for sovereignty claims (resulting from Chapter 2 analysis).

Chapter 4 (Prospects for Maritime Delimitation for the Waters of the Spratlys) will move on to apply the new developments in the international law of the sea concerning maritime delimitation to the case of the Spratlys. This will allow a better understanding of the effect of the Spratlys in generating maritime rights to the claimants and map out a prospect maritime delimitation process for the South China Sea. From the analysis of Chapter 3, the sovereignty issue has not yet been resolved; therefore, there will be no decisive answer for the maritime delimitation. However, the difficulty of the sovereignty issue will be overcome by hypothesising the potential overlapping maritime zones and classifying them into groups. Accordingly, there are two groups of overlapping zones which arise in a prospective maritime delimitation process, namely (1) potential

overlapping between the maritime zones of the Spratlys and those of the mainland of littoral states and (2) overlapping among the Spratlys' features themselves. The principles for maritime delimitation will be examined for each group of overlapping maritime zones, thus mapping out the prospective maritime delimitation results for the parties. Then, from the maximum results achieved in Chapter 2 for the maritime zones of the Spratlys, the main sources for maritime overlapping are from the 12 islands which may generate full maritime zones. Thus, by making further hypotheses according to sovereignty claims and the current occupation by the parties to the 12 islands, as examined under Chapter 3, prospective maritime boundaries will be drawn in different scenarios. The chapter will conclude that although the presence of the Spratlys makes the maritime delimitation extremely complicated, the actual overlapping area can be reduced to a doughnut area which is beyond maritime zones generated from the mainland of littoral states. Therefore, if a solution to the sovereignty issue is not reached in the coming time, it may be more beneficial for the parties to the dispute to put the doughnut area under a special regime for better management of the South China Sea dispute which will then be discussed in the last chapter.

Based on the prospects of the sovereignty and maritime issues which have been achieved in Chapter 3 and 4, Chapter 5 (Judicial or Diplomatic Methods: The Feasible Solutions to the South China Sea Dispute) will continue to analyse and recommend the most feasible solutions to the South China Sea dispute. It will start with the possibility of using judicial method to settle the South China Sea dispute. It is likely that the ICJ and international arbitration will not have jurisdiction over this dispute because of the lack of consensus, a special agreement or a *compromise.* Although unilateral submission to the dispute settlement mechanism of the 1982 LOSC shows its success in the recent *Barbados v. Trinidad and Tobago* case and this would have applied to the South China Sea, the recent reservation of China made under Article 297 has ruled out this possibility. Therefore, with no possibility for a judicial settlement, diplomatic measure is the only option for the parties. Learning from the failure of other diplomatic attempts in the 1990s, the chapter suggests that diplomatic measures will be more fruitful if they focus on building a joint development regime. Through analysing state practice in joint development and taking into account the particular situation of the South China Sea dispute, the chapter will also take a closer look at some main legal characteristics of a suitable regime for joint development for the dispute.

The thesis will end by concluding that the contemporary international law concerning territorial acquisition and the international law of the sea relating to maritime delimitation can provide a new understanding to the South China Sea dispute. In the light of this new understanding, the parties may settle the dispute through diplomatic measure towards a joint development regime. Settling this dispute will not only help to solve this long and complicated dispute in the South China Sea, but also contribute more generally to the development of the international law of the sea. If the diplomatic measure towards a joint development regime proves its success in settling the dispute, it will provide further state practice for the emerging trends of joint cooperation in solving sovereignty and maritime disputes.

Before going into detailed analysis, the two main issues need to be dealt with: (a) the scope of the thesis and (b) the status of Taiwan in the examination. Regarding the scope of the thesis, although it is true that the Paracels are related to the dispute as a whole and the security in the South China Sea can not be maintained without settling the disputes related to both the Paracels and Spratlys, the thesis will only focus on the dispute over the Spratlys. This selection is based on the fact that the dispute over the Paracels and Spratlys are similar in history, but the dispute concerning the latter is the more complicated with the participation of multiple parties (as opposed to the bilateral dispute over the Paracels). By examining the more complicated dispute concerning the Spratlys, it is submitted that its conclusion might be applied to the simpler dispute over the Paracels as well. Furthermore, the dispute over the Paracels is a bilateral dispute between Vietnam and China, but China currently occupies the entire archipelago and refuses to negotiate. Thus, any solution for the dispute over the Paracels is dependent on China and at the moment is difficult to reach. Thus, the solution for this dispute might be discussed in another time.[19] In addition, in the limited space of a thesis, focusing on the dispute concerning only the Spratlys will allow more comprehensive analysis.

With regard to the status of Taiwan, the thesis will adopt the prevailing majority view of the world community, which is that Taiwan is a province of the Peoples' Republic of China. The Taiwanese government has not gained enough international recognition to

[19] Perhaps after resolving the dispute concerning the Spratlys, China may change its attitude towards a more positive approach for dispute settlement of the Paracels.

form a separate state.[20] Therefore, in most parts of the thesis, Taiwan will be assimilated with China in the examination of sovereignty and maritime issues. However, due to the fact that for more than fifty years Taiwanese authority *de facto* exists in an independent territorial unit, it has relatively independent status which may be considered as a separate subject of rights and obligations under international law.[21] Therefore, concerning this dispute, two issues relating to Taiwan need to be examined. First, the obligations of this entity in compliance with international law which is applied in the current examination of the thesis, namely the international law concerning territorial acquisition, the law of the sea concerning the legal regime of islands and maritime delimitation. With regard to international law concerning territorial acquisition, these laws have received wide recognition in state practice and have been consistently applied in case law since the twentieth century[22] and thus, have become international customary law. Regarding international law concerning maritime delimitation, equidistance/ relevant circumstances rule is currently well recognised as an applicable method for maritime delimitation through judgments of the ICJ and international tribunals as well as state practice.[23] With effect of

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[20] Taiwan was recognised in the period from 1949 to 1970s. However, by the mid-1970s, a majority of states changed their position to recognise the People's Republic of China. By 2005, only twenty-six mostly very small states still continued to recognise Taiwan, namely Belize, Burkina Faso, Chad, Costa Rica, Dominican Republic, El Salvador, Gambia, Guatemala, Haiti, the Holy See, Honduras, Kiribati, Malawi, Marshall Islands, Nauru, Nicaragua, Palau, Panama, Paraguay, Sao Tome & Principe, Senegal, Solomon Islands, St Christopher & Nevis, St Vincent & the Grenadines, Swaziland and Tuvalu. Statistics in James Crawford, *The Creation of States in International Law,* (Oxford: Clarendon Press, 2nd ed., 2006), p.201.

[21] Taiwan appears to be a non-state territorial entity which is capable of acting independently on the international scene. This entity still maintains separate and effective authority and claims that it is an independent state. In fact, instead of an embassy, it has established its own economic and cultural offices in some states. It maintains strong informal and trade relations with some sixty states. Its accession to the WTO was approved on November 2001. It is also a member of Asian Development Bank and a party to various conventions binding its own territory, including the Convention for the Conservation of Southern Bluefin Tuna of 1993. For discussion on the special status of Taiwan, see Malcolm Shaw, *International Law,* (Cambridge: Cambridge University Press, 5th ed., 2003), p.211-2 and particularly, James Crawford, *ibid,* p.198-221. In the South China Sea dispute, although Taiwan shared the same historical claims as China, it has its own claim and occupation. For details, see *infra,* Chapter 3.

[22] International law concerning territorial acquisition was developed through some cases, namely *Island of Palmas case* (1928) 2 RIAA 829; *Clipperton Island Arbitration (France v. Mexico)* 2 RIAA 1105; *Eastern Greenland Case (Denmark v. Norway)* (1933) PCIJ Series A/B no 53; *Minquiers and Ecrehos Case (France v. UK)* ICJ Reports (1953), p.47 then was applied consistently in all other cases concerning territory such as *Qatar v. Bahrain, Cameroon v. Nigeria, Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v. Malaysia), Judgment,* ICJ Report (2002), p.625 (hereafter referred to as *Indonesia v. Malaysia* case) and *Eritrea/Yemen Arbitration,* ect. For further discussion on international law concerning territorial acquisition, see *infra,* Chapter 3.

[23] Malcolm Evans suggested that no one should be surprise if the ICJ in the next available judgement may state in clear language that the rule of international customary law is that delimitation of maritime zones is to be conducted in accordance with the equidistance/relevant circumstances rules. See Malcolm Evans, "Maritime Boundary Delimitation: Where Do We Go from Here?" in David Freestone, Richard Barnes and

international customary law and being widely applied in case law and state practice, it is submitted that contemporary international law concerning territorial acquisition and maritime delimitation will be the applicable law to the South China Sea dispute with binding effect to all parties, including Taiwan. Regarding international law concerning the legal regime of islands which is provided in the 1982 LOSC, the Court in the *Qatar v. Bahrain* case[24] recognised that Articles 13, 121(1) and (2) as well as other parts of the Convention concerning the regime of territorial sea, contiguous zone, EEZ and continental shelf have become customary international law.[25] Only Article 121(3) is left. However, in its reservation to the 1958 Convention on the Continental Shelf, Taiwan reserved that in "determining the boundary of the continental shelf of the Republic of China, exposed rocks and islets shall not be taken into account".[26] This declaration implies that Taiwan regards rocks and islets having no effect in maritime delimitation, i.e. rocks and islets cannot generate full maritime zones. This means that Taiwan's view towards the effect of small islands is in line with the stipulation of Article 121(3) of the 1982 LOSC. Therefore, it is submitted that all the parts of the 1982 LOSC related to the legal regime of islands may also be considered as having binding effect on Taiwan.

Second, as a *de facto* independent entity for more than fifty years Taiwan also has independent interests and practice, particularly in exercising its maritime rights in the South China Sea.[27] However, this entity is still left aside in negotiations due to the issue of recognition of its statehood. In order to give Taiwan opportunities to take part in the cooperation of the region, any cooperation agreement in the region in the future should take

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David Ong, *The Law of the Sea: Progress and Prospects,* (Oxford: Oxford University Press, 2006), p.137 at 147. Indeed, the Tribunal in the recent case between Guyana and Suriname elaborated that "in the course of the last two decades international courts and tribunals dealing with disputes concerning the delimitation of the continental shelf and the exclusive economic zone have come to embrace a clear role for equidistance. The process of delimitation is divided into two stages. First the court or tribunal posits a provisional equidistance line which may then be adjusted to reflected special or relevant circumstances" (2007 Award, para. 335). In the latest case between Nicaragua and Honduras, although there were exeptional geographical situations giving rise to the decision of the Court not to apply the equidistance/ relevant circumstances in delimiting maritime zones for the two countries, the Court at the same time emphasized that "equidistance remains the general rule" (ICJ Report, 2007, para.281).

[24] ICJ Reports (2001), p.40. In this case the Court applied some stipulations of the Convention related to the regime of low tide elevations, islands and maritime delimitation to Qatar, a non-member of the Convention, on the basis that these stipulations have become international customary law (at para.167).

[25] *Ibid,* paras.185, 195, 201, 205-9, 219 and 233.

[26] Point 1 in the 1970 reservation of Taiwan. For full text, see (1971) 10 *ILM* 452.

[27] Taiwan is a major player in world fisheries with the fishery export revenue in 2003 of US$ 1,298,564,000 from a total of 1,486,291 tonnes fish (Statistics of Yearbook of Fishery Statistics of FAO, online at http://www.fao.org/fi/statist/statist.asp (accessed on 26 November 2005)).

Taiwan into consideration by allows other entities to accept the binding effect of that agreement by their voluntary declarations. One of the way to allow the participance of Taiwan is to learn from the stipulation of Article XII(1) of the Marrakesh Agreements establishing the World Trade Orginisation that [a]ny state or separte customs territory possessing full autonomy in the conduct of its external commercial relations and of the other matters provided for in this Agreement, on terms to be agreed between it and the WTO. Such accession shall apply to this Agreement and the Multilateral Trade Agreements annexed thereto." According to this stipulation, Taiwan may be considered as a separeate entity possessing full autonomy in the conduct of exploiting and exploring maritime resources, e.g. in fisheries. This is the way which helps overcome the difficulty of non-recognising Taiwan due to the "one China policy" of China, but still allows the involvement of Taiwan in the international order by virtue of its legal rights and obligations. Even if this entity is united with China, it may retain relatively independent rights and obligations like the current situation of Hong Kong or Macao.[28] In fact, feeling left aside, Taiwand conducted some millitary actions putting more tension to the dispute.[29] Therefore, considering Taiwan as an independent entity holder of rights and obligations will gather all the parties concerned in the dispute and facilitate the negotiations for a dispute settlement and any agreement concerning joint development in the future.

[28] Hong Kong and Macao were transferred to China in 1997 and 1999 respectively, but still enjoy the status of one state, two regimes. Accordingly, these territories have their own economic systems like those that they had at the time before the transfer. For discussion on the current legal status of Hongkong and Macao, see James Crawford, *op.cit.*, note 20, p.244-252.

[29] On 23 March 2004, Taiwan sent a ship and installed a "bird observation station" on Banthan low tide elevation and on 16 December 2005 deployed 600 more soldiers and built an air strip in the Itu Aba Islands. Most recently, on 12 and 13 February 2007, Taiwan conducted military maneuver at water in the west of Itu Aba Island.

CHAPTER 1. INTRODUCTION TO THE SOUTH CHINA SEA

1. Geographical characteristics of the South China Sea area

1.1. Geographical and geomorphologic situation

As part of the Pacific Ocean, the South China Sea runs in a Southeast to Northeast direction from 3°N and 99°E towards the Taiwan Strait at 23°N and 120°E. The total area of the South China Sea is estimated at four million square kilometres.[30] Its depth is extremely variable, from 200 feet (60 meters) or less in the shallowest areas to over 16,000 feet (4,800 meters) in the deepest areas. The South China Sea is a truly semi-enclosed sea,

***Figure 2. Map of the South China Sea area*[31]**

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[30] Bob Catley and Makmur Keliat, *Spratlys: The Dispute in the South China Sea,* (Aldershot, Brookfield USA, Singapore and Sydney: Ashgate, 1997), p. 2.

[31] Sources: Adapted from Encarta World Alas, online at http://encarta.msn.com/map_701516645/South_China_Sea.html (accessed on 9 November, 2004).

with almost 90 percent of its perimeter consisting of land, in the form of land mass or islands.[32] It is bordered by China (including Taiwan) in the North, Vietnam, Cambodia and Thailand in the West, Malaysia, Singapore, Indonesia and Brunei in the South and finally, the Philippines in the East. The countries surrounding the South China Sea's rim are the fastest growing, the most vibrant, and densely populated economies of the world, and 270 million people live in the coastal sub-regions of the South China Sea.[33]

The South China Sea contains two gulfs, namely the Gulf of Tokin shared by China and Vietnam in the Northwest and the Gulf of Thailand surrounding Vietnam, Cambodia, Thailand and Malaysia in the Southwest. Several large rivers also flow into the South China Sea including the Pearl River of Guangdong (China), the Red River of the North Delta (Vietnam) and the Mekong River (flowing from Tibet-China, through Myanmar, Laos, Thailand, Cambodia and Vietnam).

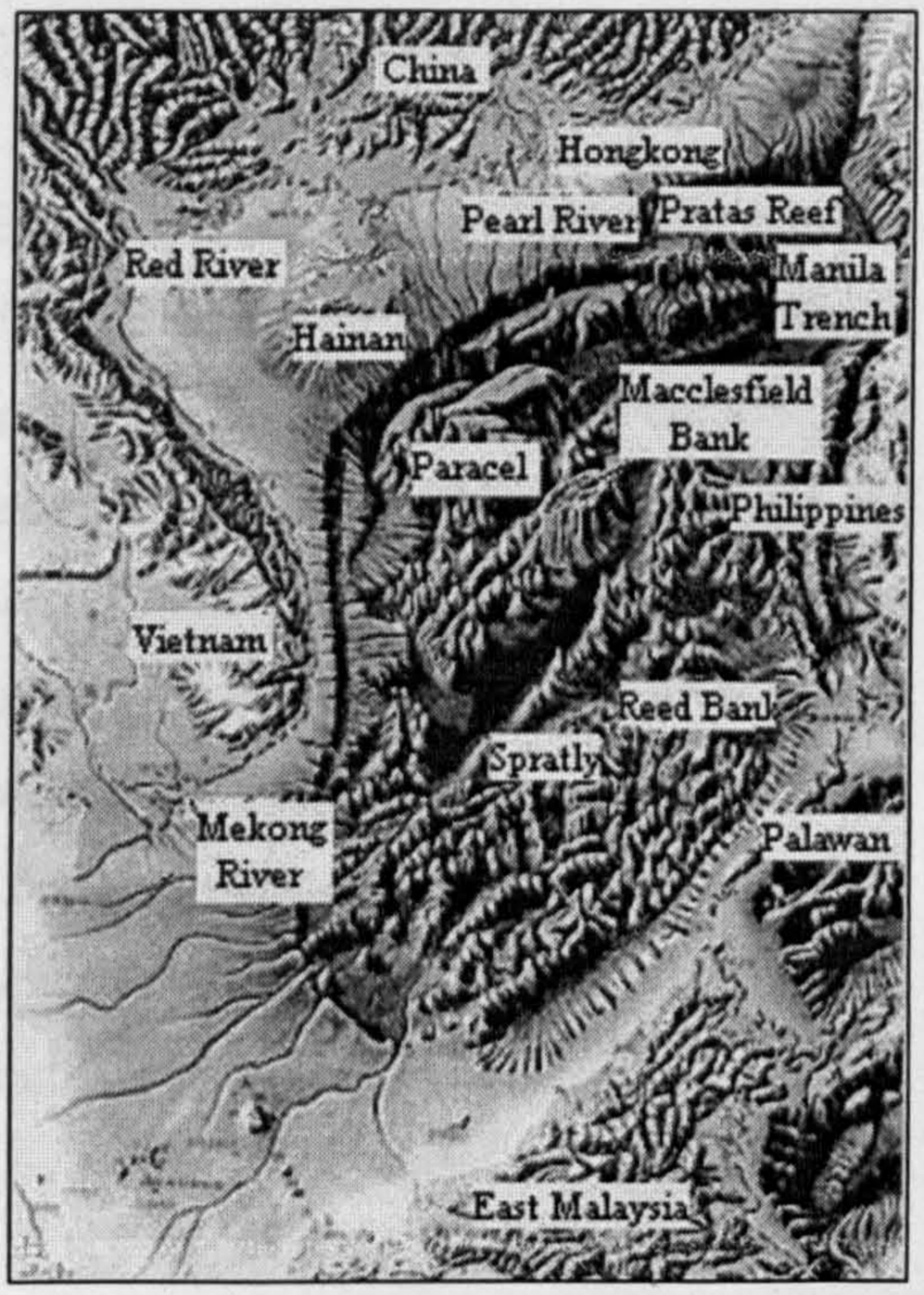

Figure 3. Topographical features of the seabed of the South China Sea[34]

In the middle of the South China Sea, there are hundreds of islands, islets, rocks, reefs and banks which can be classified into four groups, namely the Pratas Reefs, the Macclesfield Bank and two archipelagos, the Paracels and Spratlys. Most of them are coral reefs and have not been settled by human habitation.

The Spratlys, the archipelago under examination in this thesis, comprise of hundreds of features. Since many features are very tiny in size, they have not been named consistently by individual or group, thus the reported number of features in the Spratlys can vary from 148 to 235 features. The Spratlys are located between 4 and 12°N and between

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[32] Douglas M. Johnston and Phillip M. Saunders (eds.), *Ocean Boundary Making: Regional Issues and Developments,* (London, New York and Sydney: Croom Helm, 1988), p.78.
[33] Brian Morton and Graham Blackmore, "South China Sea" (2001) 42 (12) *Marine Pollution Bulletin,* 1236 at 1236.
[34] *Ibid*, p.1237.

109 and 118°E approximately.[35] The shortest distances from littoral states to the centre of the Spratlys is measured as about 200 nm from the Brooke's Point of the Philippines, 330 nm from the Southern coast of Vietnam, 247 nm off the coast of Malaysia, 405 nm from southern islands in the Paracels archipelago, 540 nm from the Hainan Island of China and 860 nm from Taiwan.[36] The whole archipelago occupies nearly 160,000 square kilometres[37] with a coast line totalling some 926 kilometres.[38] Of all the features in the Spratlys, only about 20% will be able to sustain human life, since the rest are either too small or do not always emerge above water.[39]

In the north and north-western part of the Spratlys, the features are close together and usually named by group, such as the North Danger Reefs, Thitu Reefs, Tizard Bank, Loaita Bank, Jackson Atoll, Union Reefs and London Reefs. Each group is a combination of some small islands, islets, reefs and banks. Meanwhile, in the south and south-east, the features tend to be separate from each other and stand as individual features. The features of the Spratlys are quite small as the biggest feature, the Itu Aba Island, has an area of only about 0.5 square kilometres. Although the Spratlys have long been used as temporary shelter for the fishermen in the region, there has been no permanent human habitation on any of the features, except for some military occupation by the littoral states. This may be due to the small size of all the features and the extreme weather. The Spratlys area is reported

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[35] Chemillier-Gendreau (Chemillier-Gendreau, Monique. *La Souveraineté sur les Archipels Paracelss et Spratleys,* (Paris: l'Harmattan, 1996)) described the Spratlys location at 12°N latitude and 111°E longitude; Hancox and Prescott (Hancox, David and Prescott, Victor. "A Geographical Description of the Spratlys Island and an Account of Hydrographic Surveys amongst those Islands" (1997) 1 (6) *Maritime Briefing,* p.3-30) stated that the location of the Spratlys was 12°N and 112°E; while according to Heinzig (Dieter Heinzig, *Dispute Islands in the South China Sea,* (Hamburg Institute of Asian Affairs, 1976), p.17) and Samuels (*op.cit.,* note 5, p.188), these figures were between 4 and 11.30°N and between 109.30 and 117.50°E respectively. The last statistic was in line with that of China's Xinhua News Agency and also used in Odgaard (Odgaard, *op.cit.,* note 16, p.61).

[36] Cheng-yi Lin, "Taiwan's South China Sea Policy" (1997) 37(4) *Asian Survey,* 323 at 328.

[37] Chemillier-Gendreau, *op.cit.,* note 35, p.24.

[38] CIA- The world factbook, online at: http://www.cia.gov/cia/publications/factbook/geos/pf.html (accessed on 18 November, 2004).

[39] Catley and Keliat, *op.cit.,* note 30, p.3. For analysis of how the criteria of human habitation affect the titles of claimants to the features in the South China Sea dispute, see *infra,* Chapter 2. For the lists of features of the Spratlys archipelago is of 148 in Hancox and Prescott (*op.cit.,* note 35, p. 3-30) or of 170 in Dzurek (Dzurek, Daniel J. "The Spratlys Island Dispute: Who's on first? (1996) 2 (1) *Maritime Briefing,* p.1). Also see Mark J. Valencia *et al., op.cit.,* note 16, for a description of features in Appendix 1, p. 230.

Figure 4. Features of the Spratlys Archipelago[40]

[40] Source: http://www.globalsecurity.org/military/world/war/Spratlys-maps.htm (accessed on 18 November, 2004).

to have 9 months of rainy season with an average rainfall of 2575 mm in 198 days per year.[41] The Spratlys are also considered dangerous grounds for maritime navigation, especially the central area of the archipelago which was usually highlighted as impossible for international navigation. However, fresh water and considerable phosphate deposits are found on some features of the archipelago. Also, some of the features are habitats of wild birds and contain coconut trees and small bushes.[42] This means that with the development of modern technology, the Spratlys may be suitable for human habitation in the future and from this archipelago people may be able to make use of the strategic location of the South China Sea for navigation and for its natural resources.

1.2. Strategic location for navigation and security of the South China Sea

Surrounded by the most dynamic economies in the Pacific Rim, the South China Sea occupies a vital strategic position in both maritime navigation and security not only for the littoral countries, but also for some others states outside the region. Although the Spratlys archipelago lies in its centre, occupying about 160,000 of 4 million square kilometres of the whole sea and appearing in maritime navigation maps as dangerous areas, the South China Sea still serves as one of the world's busiest international sea lanes.

The South China Sea has five straits playing the role of five gates for vessels coming in and out of the area: the Malacca Strait at the southwest, the Sunda and Lombok-Macassar Straits at the southeast and the Luzon and Taiwan Straits at the northeast. Travelling from or to Indian Ocean in the southwest, vessels can pass through the Malacca Strait, follow the sea between Vietnam and the Spratlys and exit through the Luzon or Taiwan Straits to arrive in the East China Sea or continue to the Pacific Ocean. This is the most popular sea route, which makes the Malacca Strait the second busiest in the world after the English Channel.[43] Vessels travelling to and from Africa also frequently pass through the Sunda and Lombok-Macassar Straits into the region; these entrances are primarily used by Australian North-South trade.[44]

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[41] Research of the Boundary Committee of Vietnam (Ban Biên giới Chính phủ, Kết Quả Điều Tra về Điều Kiện Tự nhiên vùng Quần Đảo Trường Sa và các Vấn Đề Khoa Học Cần Giải Quyết trong Giai Đoạn 1993-1995, 1993), p.20.
[42] For details of the description on the natural conditions of the Spratlys features, see Annex 1, *infra*.
[43] Timo Kivimaki (ed.). *op.cit.*, note 9, p. 58.
[44] *Ibid.*

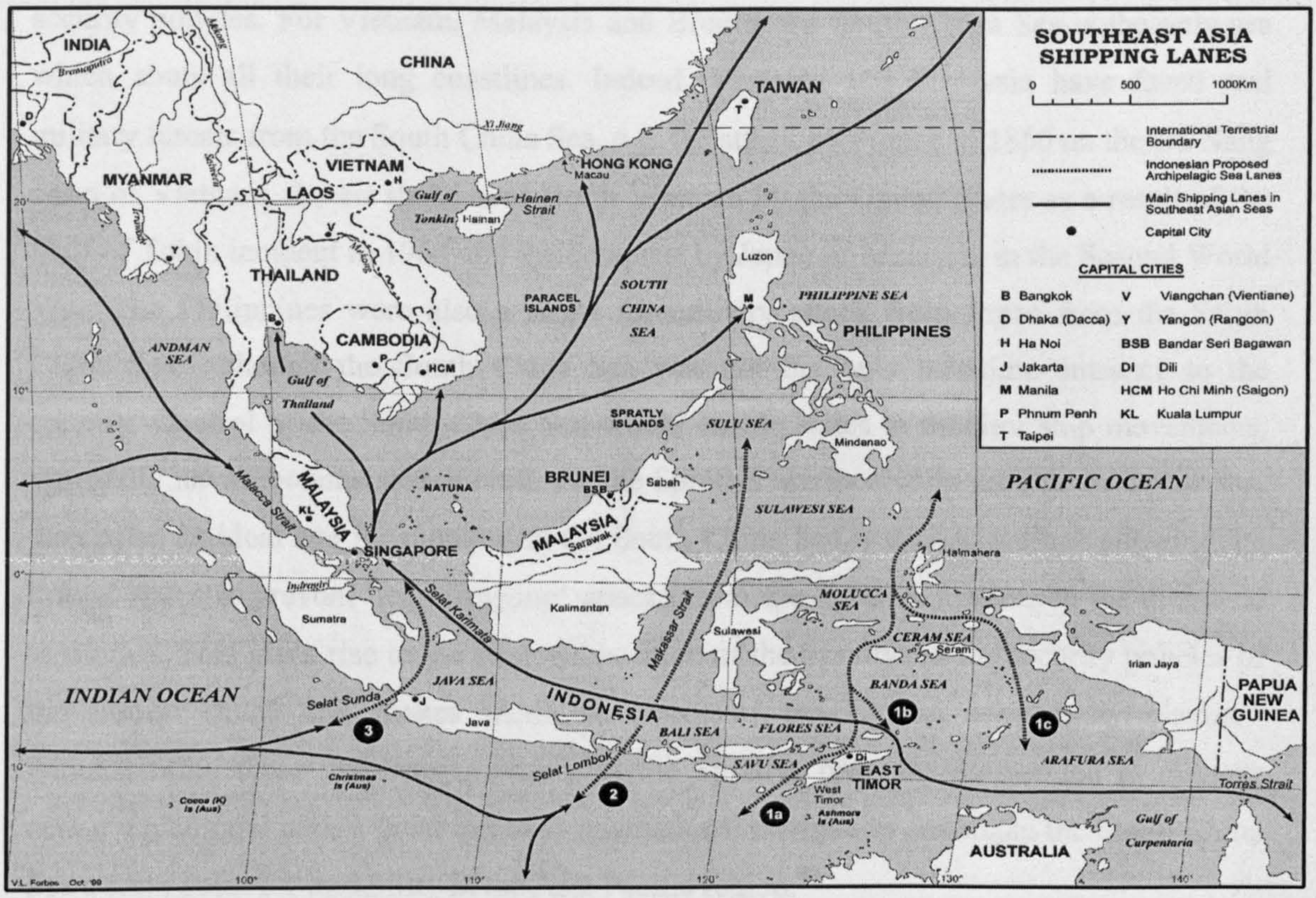

***Figure 5. Shipping lanes in Southeast Asia*[45]**

All the routes make the South China Sea a nexus on the world maritime navigation map. Normally, oil and minerals are shipped northwards, while food and manufactured goods are shipped southwards.[46] Of all the countries which are exploiting the sea routes in the South China Sea, China, Japan, South Korea and the Philippines depend the most on this route to transport their oil and gas imports. Estimates reveal that oil consumption in developing countries is expected to raise about 4 percent annually to reach 25 million barrels per day by 2020, especially for China,[47] therefore, the South China Sea will continue play its vital role as a navigational route.

Not only does it have one of the busiest sea lanes, the South China Sea also has a significant role to play in terms of security. After a long period of war resulting from colonial regimes and the divided situation brought about by the cold war, the vulnerable states in the region all consider the South China Sea to play a very important role in their

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[45] Sources: Presentation of Professor Beckman in the 5th Science Council of Asia Conference, Hanoi, May 11-13, 2005.

[46] Timo, *op.cit.,* note 9, p.58.

[47] Noer, John H. *Chokepoints: Maritime Economic Concerns in the Southeast Asia,* (Washington: National Defense University Press, 1996), p. 9.

security policies. For Vietnam, Malaysia and Brunei, the South China Sea is the only sea which abuts all their long coastlines. Indeed, Vietnam and Malaysia have faced real military threats from the South China Sea, e.g. the attack by France in 1856 on the Da Nang coast of Vietnam, the air strike over North Vietnam by the United States as a result of the Gulf of Tokin incident in 1964 and the conquest by Japan of Malaysia in the Second World War. The Philippines were also a target for military attack from Japan from the South China Sea, although the South China Sea was not the only maritime entrance to the country. Control of the South China Sea would enable states to monitor ship movements, especially naval reconnaissance craft. As the Spratlys are located in the middle of the sea, they offer an ideal site for monitoring the South China Sea waters as well as allowing the littoral states to prevent 'leap-frogging' attacks from the Spratlys features to the mainland territories. This gives rise to the strategic position of the Spratlys in the security policies of the littoral states and makes them an object of overlapping sovereignty claims.[48] Paradoxically, these overlapping claims to the Spratlys have themselves led to military action which now pose a great threat to international navigation and make the South China Sea a flash point for instability in the Asia Pacific region.[49]

2. Natural resources in the South China Sea

In addition to its strategic location, the South China Sea is one of the world's most diverse shallow water marine areas and one of the thickest of sedimentary basins. Its favourable geographic location endows the South China Sea with a diverse marine ecology, and a variety of natural resources, including hydrocarbons and fisheries. The South China Sea is one of the richest seas in the world, with thousands of species of flora, fauna, coral reefs, mangroves, sea grasses, fishes and plants.[50] Furthermore, the two archipelagos, the Paracels and Spratlys, are "major nesting areas for migratory sea tortoise, the eggs, flesh and shells of which have been harvested for centuries".[51] Also, being attractive areas for

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[48] For example, the monograph of the Philippines Ministry Defense in 1992 remarked that: "It may be recalled that the territory was used by Japan in World War II as a staging area for the conquest of the Philippines, Indonesia, and Malaysia. Kalayann group is therefore considered vital to the national defense and security of the Philippines. Adversarial occupation of these islands by an unfriendly power will constitute a threat to the national security and territorial integrity of the Philippines". Quoted in Catley and Keliat, *op.cit.*, note 30, p.98. However, all these security consideration might be changed now as with the development of modern technology, the monitoring can be conducted by satellite.

[49] For details of the military actions, see *infra,* Chapter 3.

[50] Brian Morton and Graham Blackmore, *op.cit.*, note 33, p. 1240.

[51] Samuels, *op.cit.*, note 5, p.3.

birds, they contain rich reserves of phosphate deposits from bird manure. All this combines to create an ideal natural environment for living resources and a spectacular marine ecology for the South China Sea, giving rise to significant economic interests of the littoral states. In addition to the phosphate deposits and fishery resources which have been known to be under exploitation for a long time, the littoral states have recently discovered the potential of the marine ecology in the South China Sea to act as a catalyst for the development of tourism and marine research.[52] However, among many economic interests, the richness of the fisheries and the value of hydrocarbon resources remain the principal reason for the parties'claims to the Spratlys.

2.1. Hydrocarbon Potential

The major hydrocarbon potential in the South China Sea lies in its considerable amount of oil and gas reserves. In the onshore areas of the South China Sea, the black gold resources have been known since the colonial period,[53] and reserves are estimated (in million of barrels) at 1,500 for Southern China, 210 for South Hainan Island, 95 for the Gulf of Tokin, 2847 for Southern Vietnam, 180 for the Sunda Shelf, 9,260 for Borneo/Sarawak and 409 for the Philippines.[54] So far, littoral states have effectively conducted exploitation in these areas. For example, China currently exploits the huge Yacheng gas field south of Hainan Island and the Xijiang fields near the Pearl River Delta. Malaysia has already produced gas in the Central Luconia and James Shoals gas fields off the coast of Sarawak. The Philippines is exploiting the Camago and Malampaya gas fields which are located in the Northwest water of Palawan. Indonesia has exploited the Natuna gas field which is located at the far south of the Spratlys and is in dispute with Vietnam. Indonesia plans to install pipelines from this field to Singapore. Vietnam is operating joint ventures with BP and ONGC, an Indian oil company, in the Lan Tay and Lan Do gas fields.

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[52] Although the Spratlys is currently under dispute, some littoral states such as the Philippines, Malaysia and Indonesia have already made use of this advantage to develop marine-based tourism which yields valuable foreign exchange and creates job opportunities for local people. Vietnam, recently, also reported to conduct the first organised tourist visit to the Spratlys in April 2004 under the Defence Ministry auspices. (Information from Comparative Connection, Pacific Forum 's Quarterly Electronic Journal on East Asian Bilateral Relations, 1st quarter 2004, online at http://www.csis.org/pacfor/ccejournal.html (accessed on 2 February 2005)).

[53] The first modern well in coastal areas was drilled in West Java in 1872 and similar exploitation also took place in the Philippines in 1896. Then, much later, in 1957, the first offshore well was drilled by Royal Dutch Shell on North Borneo's continental shelf (Samuels, *op.cit,* note 5, p.154).

[54] Brian Morton and Graham Blackmore, *op.cit.,* note 33, p.1237.

Vietnam has also very successfully exploited the Bach Ho, Dai Hung and Thanh Long oil fields, which are situated off the southeast coast near Ho Chi Minh City, and which have total reserves of 550 billion barrels of oil.[55] In addition to separate exploitation activities, Vietnam and Malaysia also have agreed to set up a joint exploitation of hydrocarbon resources in the overlapping marine areas between them.

In the offshore areas, especially the Spratlys area, the hydrocarbon resources are also thought to be available in large quantities, although the estimates from different countries vary enormously. In 1989 China sent a survey vessel through the South China Sea and estimated that the Spratlys area held deposits of 25 billion cubic metres of natural gas and 105 billion barrels of oil. In 1988, US geologists estimated that the Spratlys only had reserves of 2.1 to 15.8 billion barrels of oil.[56] Meanwhile, Russia's Research Institute of Geology of Foreign Countries in 1995 gave the estimate of 7.5 billion barrels of oil equivalents, of which 70% are probably gas.[57] In the framework of the Workshop on Managing Potential Conflicts in the South China Sea, a survey of natural resources in the South China Sea was assigned to the Technical Working Group on Resource Assessment. However, due to the sensitive sovereignty and territorial issues, no result was submitted for hydrocarbon resources.[58] Recently, under the joint exploration agreement in the eastern area of the Spratlys among China, the Philippines and Vietnam,[59] the survey vessel of China collected seismic data from the seabed on 16 November 2005 and the statistics of hydrocarbon resources for the region are expected to be available in the coming years.[60] At the moment, there is no dependable estimate for the hydrocarbon resources of the Spratlys. Comprehensive exploration of the area may take many years and may involve millions of

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[55] Timo, *op.cit,* note 9, p.55 and Craig Snyder, "The Implications of Hydrocarbon Development in the South China Sea" online at http://faculty.law.ubc.ca/scs/ (accessed on 24 November 2005).
[56] Craig Snyder, *ibid.*
[57] Mark J. Valencia, *China and the South China Sea Disputes,* (Oxford University Press, Adelphi Paper, 1995), p.10.
[58] For further information on the Workshop on Management Potential Conflicts in the South China Sea, see Chapters 3 and 5, *infra.*
[59] China and the Philippines reached an agreement in joint scientific research between the Philippines National Oil Company and the China National Offshore Oil Company in the South China Sea in September 2004. Vietnam also jointed in this agreement in March 2005. The agreement will last for three years and cover an area of 143 square kilometres. This movement was hailed as a diplomatic breakthrough for peace and security in the region. For details, see Press Release of The Department of Foreign Affairs of the Philippines, online at http://www.dfa.gov.ph/news/pr/pr2004/sep/pr524.htm (accessed on 19 October 2004).
[60] China, Vietnam and the Philippines end seismal survey in the South China Sea, for details see: http://tuoitre.com.vn (accessed on 20 November 2005).

dollars and numerous wells because of the complicated geological situation of the archipelago.[61]

Despite the lack of reliable statistics, the high potential for hydrocarbon resources in the Spratlys is one of the reasons that inspire the parties to make claims to the archipelago, given the importance of oil and gas in the national economies of the littoral states. China, with the highest economic growth rate and a huge population, is always hungry for oil and gas resources. In fact, the energy consumption of China has risen 1.8 times faster than the increase of its gross national product and it has had to import oil since 1974.[62] For Vietnam and Malaysia, crude oil and gas are the main sources of export revenue. Brunei, a zone-locked country which has marine access only to the South China Sea, is also totally dependent on oil for its income. This is not the situation of the Philippines, where oil imports create a heavy financial burden. Therefore, all of the littoral states are really keen to expand their sovereignty over any area which contains hydrocarbon resources. Also, the Spratlys provide ideal and convenient sites for transportation and installation of oil drilling for exploration and exploitation activities in the shallow water of the South China Sea.

The scramble for oil in the Spratlys began with the Philippines in 1974 when this country invited some foreign oil companies, namely Mobil, Exxon, Shell and Standard Oil of Indiana, to explore the oil resources in the eastern area of the Spratlys (the Reed bank and its surroundings area).[63] These activities were continued in 1979 and oil reserves were found in one of the islands in this area. Then, Kirkland Oil received a concession in the late 1980s. Most recently, Alcorn, the Philippines' subsidiary of the American Vaalco Energy Company, was permitted to conduct a desk-study, also in the Reed Bank area, in 1994.[64]

China also joined the search for oil in the Spratlys area when it gave a contract to Crestone Energy Corporation of the United States in 1992 to explore oil and gas in the Western Spratlys, the Vanguard Bank, 600 miles south of China's Hainan Island. Vietnam claimed that the area was within its continental shelf and at that time under the lease to BP, whereas China argued that the concession belonged to its historical sovereign area of the

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[61] Craig Snyder, *op.cit.*, note 55.
[62] It is estimated that every 1% increase of GNP goes along with a 1.8% increase in oil consumption. For further analysis on China's oil consumption, see Marko Milivojevic, "The Spratly and Paracel Islands Conflict" (1989) January-February *Survival,* p.76.
[63] Catley and Keliat, *op.cit.*, note 30, p.47.
[64] Timor, *op.cit.*, note 9, p.56.

South China Sea. This led to military confrontation between China and Vietnam when China declared its intention to use military force to back up the operation of Crestone.[65] The tension was eased after the leaders of China and Vietnam met in Hanoi and agreed to refrain from all acts that complicated and broadened the conflict.[66]

Some oil and gas fields which have been explored and exploited by claimants in the adjacent waters to their coastal lines and the South China Sea area are illustrated in Figure 6:

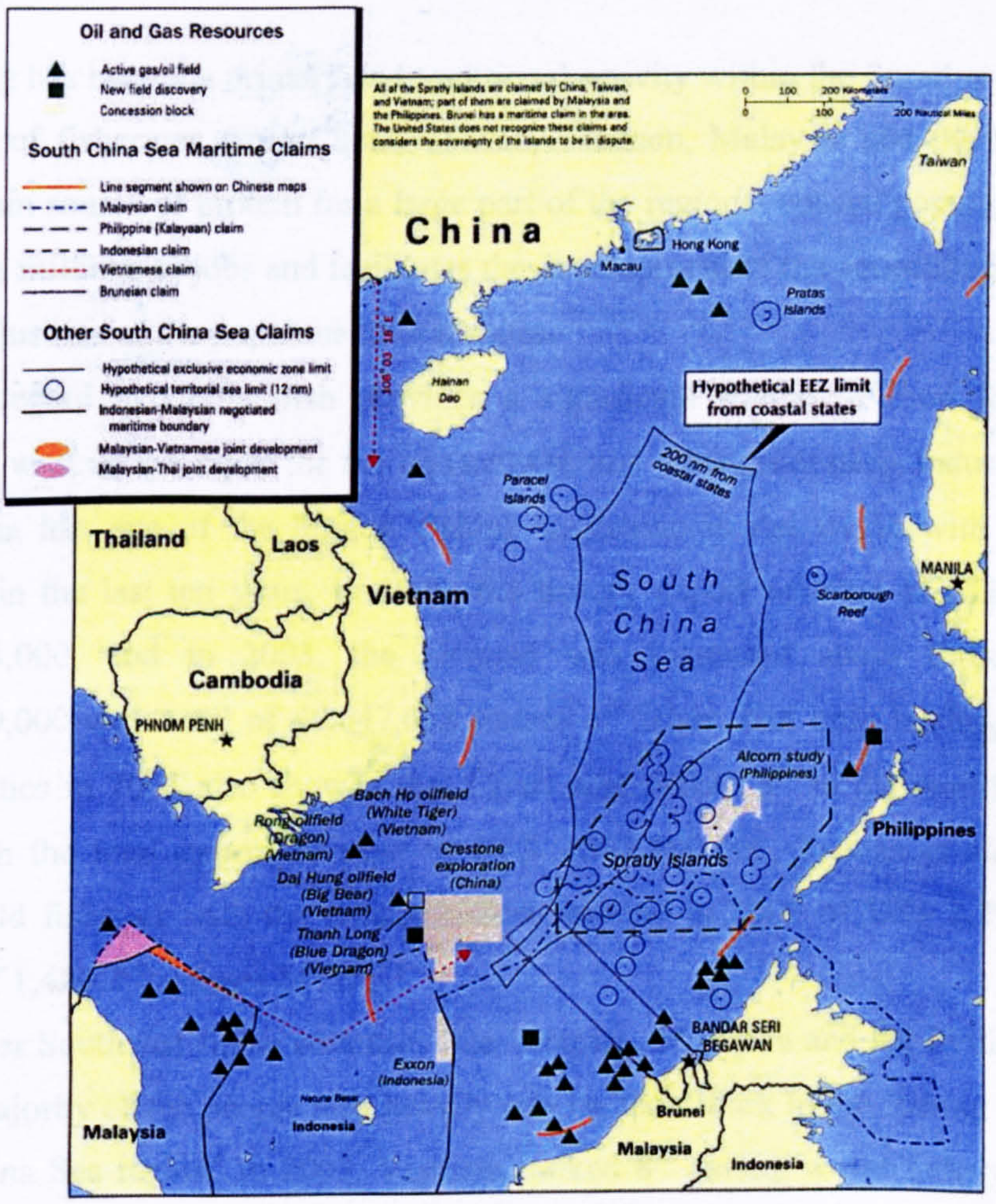

Figure 6. Allocation of oil and gas resources in the South China Sea region[67]

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[65] Liselotte Odgaard, *op.cit.*, note 16, p.85.
[66] Craig Snyder, *op.cit.*, note 55.
[67] Source: CIA Maps and Publications for the Public. On line at: http://www.eia.doe.gov/emeu/cabs/schinatab.html (accessed on 31 January 2005). As the sovereignty in some area of the South China Sea region was in dispute, the countries' names indicated in gas and oil fields on the map only showed that the exploitation activities at that field were carried out by those countries.

2.2. Fishery resources

The South China Sea ranks as one of the richest fishing grounds in the world with many varieties of fish such as round scads, sardine, big-eye scads, mackerel and tuna. It stands at number 4 among the 19 richest world fishing zones.[68] In the waters around the Spratlys alone, fishing capacity is estimated at 7.5 tonnes per square kilometre a year.[69] Annually, the South China Sea states and entity produce over 8 million metric tonnes live weight of marine fish, accounting for 10 percent of the total world catch and 23 percent of that of Asia.[70]

Fishing has been the primary and traditional activity within the Spratlys waters with the operation of fishermen from China, Taiwan, Vietnam, Malaysia and the Philippines. Fish is the main source of protein for a large part of the regional coastal populations. Also, fishing creates millions of jobs and facilitates the development of the aquaculture and aqua-processing industries of the populous littoral states.

With regard to China, fish provides a significant source of food for its huge population as well as the input for the aquaculture and aqua-processing industries of the country. China has one of the biggest fishing industries in the world with the fastest development in the last ten years. In 1990, the fishery export revenue of China reached US$1,622,123,000, and in 2003, the revenue was increased about three times to US$5,243,459,000 with total of 45,647,658 tonnes of fishes. Not only leading in fishery exports, statistics in 2003 also showed that China was ranked 8th in the world of fishery importers with the total import revenue of US$ 2,388,590,000. Taiwan is also a major player in world fisheries with the fishery export revenue in 2003 of US$ 1,298,564,000 from a total of 1,486,291 tonnes of fish.[71]

In other Southeast Asian countries like Vietnam, Malaysia and the Philippines, the lives of the majority of the people also heavily rely on their work in the fishing industry in the South China Sea region. In 2003, Vietnam ranked 8th among world fishery exporters with the fishery export revenue of US$ 2,207,578,000 from 2,604,388 tonnes of fish.

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[68] Timo, *op.cit.*, note 9, p. 44.
[69] Alan Dupont, *The Environment and Security in Pacific Asia*, (Oxford: Oxford University Press, Adelphi Paper, No. 319, 1998), p.53.
[70] *Ibid.*
[71] Statistics of Yearbook of Fishery Statistics of FAO, online at http://www.fao.org/fi/statist/statist.asp (accessed on 26 November 2005).

Malaysia and the Philippines also hold considerable fishing industries of 1,454,244 and 2,628,799 tonnes of fishes respectively from capture and aquaculture in 2003.[72]

As fishing plays an important role in the region and the Spratlys are ideally located in the middle of the richest fishing grounds of the South China Sea, it comes as no surprise that the archipelago is an attractive place for the littoral states to expand their sovereignty. The Spratlys become even more desirable when the 1982 LOSC gives rise to the possibility of mid-ocean islands having expanded maritime zones (EEZs and continental shelves), granting them extended fishing rights.[73] Also, for a country like China, with a huge territory but comparatively modest coastlines, its claim to the Spratlys is the way for the country to expand its fishing rights to the rich fishery resources of the South China Sea.

So far, with regard to fishing rights, tensions have occurred among the littoral states. In the waters adjacent to the coastlines of the littoral states, disputes over fishing rights have occurred in the South-west of the South China Sea between Thailand, Malaysia and Vietnam and in the North-east of the South China Sea between China and Taiwan from 1994 to 1997. More seriously, in the adjacent waters to the Spratlys archipelago, disputes among China, Vietnam, the Philippines and Taiwan have occurred. These disputes led to the capture of many fishermen and fishing boats, most of which were from China from 1997 to 2002 as follows:[74]

Date	*Incidents*
8 August 1997	The Philippine navy arrested 23 Chinese fishermen for illegal fishing in the waters around Northeast Cay.
November 1998	The Philippine military arrested 20 Chinese fishermen on board 6 sampans near Arellano Reef.
20 July 1999	A Chinese fishing boat was sunk by a Philippine gunboat near the disputed Spratly Islands in the South China Sea. Two others were chased and fired on by a Philippine naval vessel. One was rammed and sank with 11 people on board.
6 January 2000	A Philippine naval vessel sighted six Chinese fishing vessels, reportedly carrying

[72] *Ibid.*

[73] According to Article 121(3) of the 1982 LOSC, only an island that can sustain its own economic life can have all maritime zones. Not all of the features of the Spratlys meet this condition, thus may not have EEZs and continental shelf zones. For the analysis of the sovereign rights which might be generated from the two archipelagos, see *infra*, Chapter 2.

[74] Sources: Compiled from the database on South China Sea of the International Boundaries Research Unit of the University of Durham, online at http://www-ibru.dur.ac.uk/database/data.html and the Comparative Connection, Pacific Forum 's Quarterly Electronic Journal on East Asian Bilateral Relations, From the volumes of 3rd quarter 1999 to 4th quarter 2003, online at http://www.csis.org/pacfor/ccejournal.html (accessed on 2 February 2005).

	coral, off Scarborough Shoal.
26 May 2000	A Philippine naval vessel fired upon and killed the captain of a Chinese fishing boat and detained other fishermen. The fishing boat was reportedly spotted poaching turtles 8 km away from Palawan island.
15 January 2001	A Philippine air force plane sighted four Chinese fishing boats near Scarborough Shoal.
1 February 2001	The Philippine navy boarded four Chinese fishing boats, confiscated their catch of endangered sea turtles and ordered them to leave Philippine water.
May 2001	23 April the Philippines navy reported that 10 Chinese fishing vessels were spotted poaching off Thitu Island, Nanshan Island and Thomas Shoal. On 1 May Philippine navy patrol boat fired warning shots on a Chinese vessel fishing in the same area and confiscated five sampans. At the end of May Philippine maritime police detained two Chinese fishing vessels and 34 crews.
10 June 2001	Vietnamese Coast Guard seized four Chinese vessels and 51 crews for illegal fishing in the waters off central Vietnam.
20 September 2002	Chinese Ambassador in Manila demanded that the Philippine government release some 122 Chinese fishermen being held in custody pending trial.
October 2003	Taiwan expelled 11 Vietnamese fishing boats from the Spratlys.

This situation partly resulted from the fact that the fishery legislations of littoral states take account of territorial claims and these generate many overlapping fishing areas.[75] In addition, in order to fortify their claims in the claimed waters, some countries have increased their own fishing activities while the others have responded with increasing captures of fishing boats and fishermen. With the highest fishery production, China was the country which exploited the most fishery resources in the disputed areas. These arrests have increased the tension among claimants and could well trigger a military confrontation in the future. Therefore, it is desirable to build a fishery regime applicable in the disputed area in order to reduce such tensions and facilitate settlement of the South China Sea dispute. The places where fishing clashes usually occur are marked in Figure 7 as follows:

[75] For details of the territorial claims in the South China Sea, see Chapter 3, *infra*.

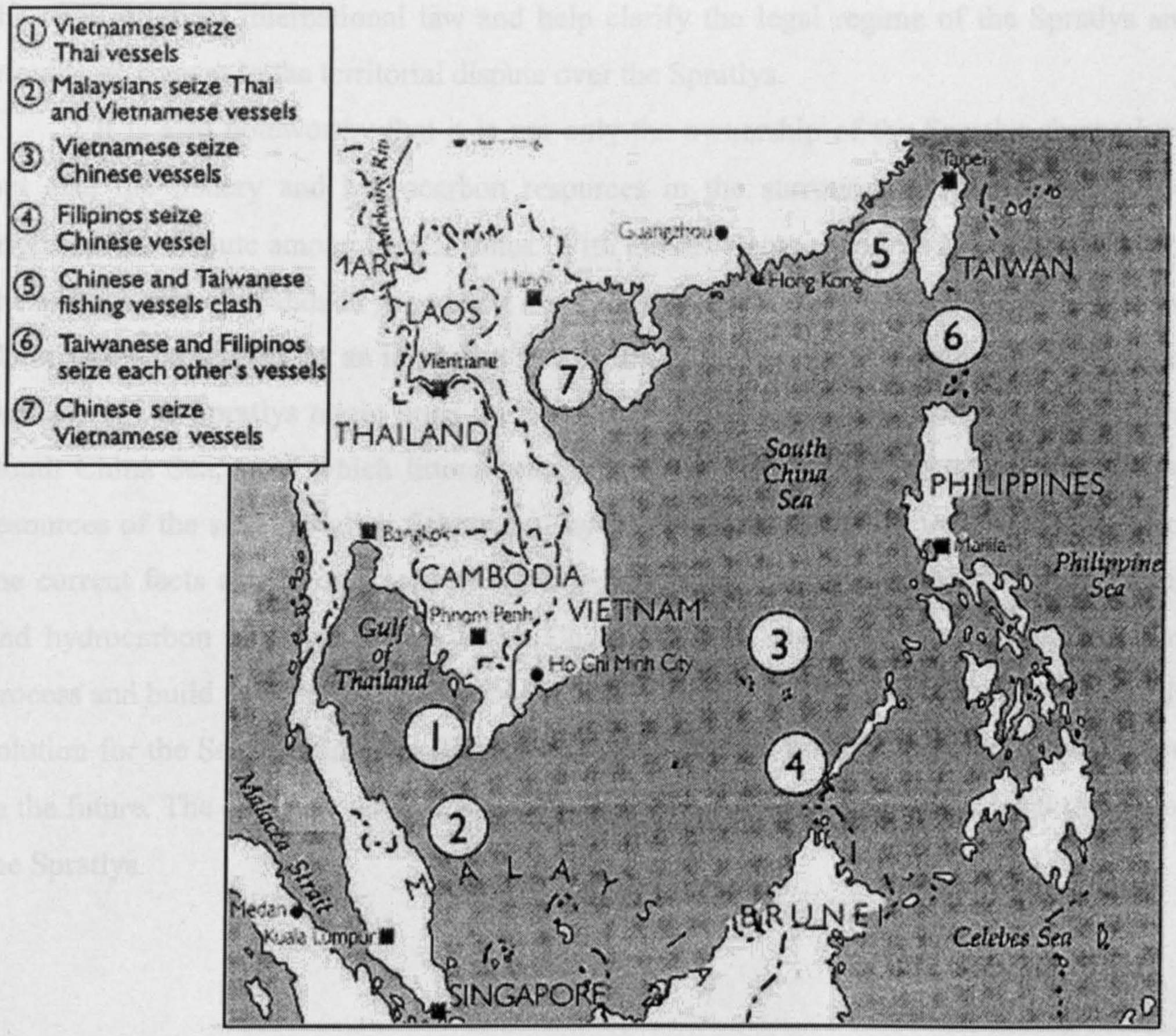

Figure 7. Clashes over fishing rights in the South China Sea[76]

3. Conclusion

The Spratlys is an archipelago located in the middle of the South China Sea, one of the biggest semi-enclosed oceans in the world. The geographical location, the resources based in its features and surrounding waters, are all factors which individually and in combination make the Spratlys of vital strategic interest to the littoral states. The Spratlys can be used as a stepping stone for littoral states seeking to grasp the entire 'geostrategic lake' of the South China Sea. Therefore, it comes as no surprise that they are objects of a long-lasting dispute with multiple parties in the region. A careful examination of the geographical characteristics of the South China Sea area will facilitate the understanding of

[76] Sources: Adapted from the map provided by the Foreign Policy Association of the United States, online at: http://cat.middlebury.edu/southchinasea/maps/dupont3.jpg (accessed on 2 February 2005).

the application of international law and help clarify the legal regime of the Spratlys and provide an answer to the territorial dispute over the Spratlys.

It is also noteworthy that it is not only the ownership of the Spratlys themselves, but also the fishery and hydrocarbon resources in the surrounding waters which have triggered the dispute among littoral states. With the development of the international law of the sea, the role of islands in generating maritime zones is increased significantly. Thus, the Spratlys features also play an important role in 'economic' security. Control of the enlarged features of the Spratlys might open the possibility of entitlement to maritime zones in the South China Sea, from which littoral states could have sovereign rights over the natural resources of the sea, including fishery and hydrocarbon resources of great potential. Also, the current facts and figures concerning exploration and exploitation activities of fishing and hydrocarbon resources in the South China Sea will assist the maritime delimitation process and build up other necessary cooperative mechanisms in order to arrive at a feasible solution for the South China Sea dispute and better manage potential conflict in the region in the future. The next chapter will take this study forward by analysing the legal regime of the Spratlys.

CHAPTER 2. THE LEGAL REGIME OF THE SPRATLYS

1. Introduction

From the analysis presented in the previous chapter of the strategic location, economic interests, navigation and security it comes as no surprise that the Spratlys have been an object of dispute among the littoral states in the South China Sea. From those disputes, two main legal issues have emerged, namely the sovereignty over the features of the Spratlys and the maritime delimitation of the adjacent waters. International law provides that sovereignty claims can only be made to territory and the capacity of generating maritime zones also varies according to the legal status of the different features in question.

In general, seabed elevations are classified into three legal groups: islands, low tide elevations and others which are always under the water even at low tide. Of the three groups, islands are the most important features as they allow states to generate title and entitlement to certain maritime zones. The maritime zones of islands depend on a further distinction, in which due to human habitation and economic life, some islands are only entitled to a territorial sea and contiguous zone, whereas others are enable to generate all maritime zones including territorial sea, contiguous zone, EEZ and continental shelf.[77] These different groups of features have different legal regimes.

The legal classification is especially important to the Spratlys as it is necessary to clarify which features are islands, and thus eligible for territorial claims. It also helps to estimate the maritime zones, if any, of the features of the Spratlys and how these maritime zones can be delimited among the littoral states. This examination, due to the difficulty of geography and the disputed situation, will be based on some objective geographical statistics of scholars in reliable publications.[78]

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[77] These are the requirements of Article 121(3). For further discussion, see *infra* this Chapter.

[78] Due to the fact that the Spratlys is occupied by military forces and the parties have conducted many activities to expand the features which they are occupying, it is difficult to visit the scene to obtain precise geographical information. The distinctions between islands and other elevations in the Spratlys in this thesis will be based on the available information from reliable and objective sources such as the sailing directions and research published by American, British and French scholars. The sources of the information are David Hancox and Victor Prescott, *op.cit.*, note 35; Valencia *et al.*, *op.cit.*, note 16, Appendix 1, p.227; Alex G. Oude Elferink, "The Islands in the South China Sea: How does their Presence Limit the High Seas and the Area of the Maritime Zones of the Mainland Coast" 32 (2001) *ODIL*, 169; Joseph R. Morgan and Mark Valencia (eds.), *Atlas for Marine Policy in Southeast Asian Sea*, (University of California Press, 1983).

2. Islands, low tide elevations and other elevations: A classification for the Spratlys

2.1. Islands in the Spratlys: The application of Article 121(1) of the 1982 LOSC

The distinction between islands and other elevations is set out in Article 121(1) of the 1982 LOSC which provides that "[a]n island is a naturally formed area of land, surrounded by water, which is above water at high tide".[79]

The criteria of "natural formed area of land" sets out the strict requirement that primarily, an area of land will only be considered an island if it is a product of nature. It eliminates the possibility of applying the article to artificial islands, i.e. islands formed by the interference of human beings.[80] Furthermore, the requirement of being "above water at high tide" establishes the distinction between an island and a low tide elevation as the common characteristic between an island and a low tide elevation is "a naturally formed area of land surrounded by water" but an island is above, whereas a low tide elevation is submerged at high tide.[81]

In order to qualify as an island, all of the requirements of the Article 121(1) should be met in combination. This means that any elevation which does not meet the requirement of Article 121(1) is not entitled to the legal status of an island.

In the case of the Spratlys, due to the geographical and geomorphologic situation, there are a large number of features, most of them, with a coral structure, are submerged at high tide. In order to make the elevations above water at high tide, some parties to the dispute have attempted to build structures such as lighthouses, military structures, weather stations, etc. These actions will not change the legal status of low tide elevations to that of islands because of the requirement that islands be "naturally formed".[82]

Applying the double tests of "natural formed area of land surrounded by water" and "above at high tide" of the Article 121(1) in the geographical and geomorphologic situation of the Spratlys, there are 35 features that qualify as islands.[83] They are listed from the North to the South and from the East to the West as follows:

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[79] This definition was also stipulated in Article 10(1) of the 1958 Convention on the Territorial Sea and the Contiguous Zone.

[80] Artificial islands will be discussed, *infra* this Chapter.

[81] Article 13 of the 1982 LOSC. For further discussion on the elements constitute an island under Article 121(1) see John Briscoe, "Islands in Maritime Boundary Delimitation" (1988) *Ocean Yearbook*, 14 at 15-20.

[82] These actions may help some low tide elevations to qualify base points for straight base lines. This possibility will be discussed, *infra* this Chapter.

[83] For statistics of the natural conditions of the features of the Spratlys, see Annex 1, *infra*.

- Northeast Cay and Southeast Cay in North Danger Reef
- Sandy Cay and Thitu Island in Thitu Reefs
- Loaita Cay, Lankiam Cay, Loaita Island and West York Island in Loaita Bank
- Flat Island and Nanshan Island in Jackson Atoll
- Itu Aba Island, Sand Cay, Eldad Reef, Nanyit Island, Gaven Reef and Discovery Great Reef in Tizard Bank
- Sin Cowe Island, Collin Reef, Whitsun Reef and Lansdowne Reef in Union Reefs
- Spratly Island, West Reef, East Reef and Cuarteron Reef in London Reefs
- Fiery Cross Reef, Pearson Reef, Pigeon Reef, Amboyna Cay, Barque Canada Reef, Mariveles Reef, Swallow Reef, Royal Charlotte Reef, Louisa Reef, Alicia Reef and Commodore Reef.

2.2. Low tide elevations: The application of Article 13(1)

Many other features in the Spratlys do not fall within the definition of an island and so must be further classified as either a low tide elevation or another feature. A low tide elevation, or a "drying rock" or a "bank", (other names in some older text books), is defined by Article 13(1) of the 1982 LOSC as "a naturally formed area of land which is surrounded by and above water at low tide but submerged at high tide". Applying this definition to the case of the Spratlys, the following features are low tide elevations:

- North Reef, South Reef in the North Danger Reef
- Subi Reef in Thitu Reef
- Irving Reef in Loaita Bank
- Petley Reed and Discovery Small Reef in Tizard Reef
- Johnson South Reef, Loveless Reef, Hughes Reef, Higgens Reef, Kennan Reef, Holiday Reef and Zhangxi Jiao in the Union Reefs
- Central Reef, Ladd Reef in the London Reefs
- Cornwallis South Reef, Alison Reef, First Thomas Shoal, Erica Reef, Ardasier Reef, Dallas Reef, Livock Reef, Boxall Reef, Mischief Reef, Bombay Shoal, Iroquois Reef, Royal Captain Shoal and Half Moon Shoal in other areas of the Spratlys.

The special geographical structure of coral, low tide elevations and other features which are submerged at low tide in the Spratlys can also be called reefs. Other features which are built up by human activities in order to be above water at high tide or to have their areas expanded

are categorised as artificial islands. In comparison to islands and low tide elevations, artificial islands and reefs have a different legal status.[84] Islands, low tide elevation and artificial features, depending on their legal regime, will have different effects on generating maritime zones of the Spratlys and upon the maritime delimitation of the South China Sea.[85]

3. Legal regime of islands in the Spratlys: The application of Article 121(3) of the 1982 LOSC

Although Article 121(3) is part of the 1982 LOSC to which all interested parties in the dispute are either bound or have expressed their acceptance,[86] there is a question mark over its customary law status due to its not being followed in state practice, and because it has not been clearly endorsed by the ICJ.[87] This may lead to further arguments that as a result of state practice a new customary international law might be formed superseding Article 121(3).[88] If it has not yet become general customary international law, at least it

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[84] Reefs under the provision of Article 6 of the 1982 LOSC will serve as basepoints in certain circumstances. For further discussion, see *infra* in this Chapter.

[85] See *infra,* Section 5, this Chapter for further discussion.

[86] See *supra,* Introduction for the acceptance of Taiwan.

[87] Kwiatkowska and Soons argued that Article 121(3) had not been followed by coastal states, and thus was not binding law. For details, see Kwiatkowska and Soons, "Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of their Own" 21(1990) *NYIL,* 174 at 174-80.

[88] The possibility of new customary law formed to supersede treaty law was long discussed in international law. Many writers have acknowledged the possibility of changes occurring to treaty rules through the process of customary international law. For discussion, see Karol Wolfke, *Custom in Present International Law,* (Dordrecht, Boston, London: Martinus Nijhoff Publisher, 2nd ed., 1993), p.101-2; H.W.A. Thirlway, *International Customary Law and Codification,* (Leiden: A.W. Sijthoff, 1972), p.131; Mark E. Villiger, *Customary International Law and Treaties,* (Dordrecht, Boston, Lancaster: Martinus Nijhoff Publishers, 1985), p.215; Michael Buyers, *Custom, Power and the Power of Rules: International Relations and Customary International Law,* (Cambridge University Press, 1999), p.174; Nancy Kontou, *The Termination and Revision of Treaties in the Light of New Customary International Law,* (Oxford: Clarendon Press, 1994), p.22; Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points" (1957) 33 *BYIL* 203 and Bowett, "Reservations to Non-restricted Multilateral Treaties" (1976-7) 48 *BYIL* 66. The writers agree that customary law as a result of social development can serve as a codifying instrument to supersede international law. This is particularly correct as there is no hierarchy of sources in international law, and customary law and treaties are equal. This possibility was also discussed in the negotiation process of the 1969 Vienna Convention on the Law of Treaties in which the draft of Article 38 said "A treaty may be modified by subsequent practice in the application of the treaty establishing the agreement of the parties to modify its provisions" (Report of the International Law Commission on the Work of its 18th Section (1966) 2 Yearbook of the International Law Commission, 172 at 182). Although this Article was not included in the final text of the Convention, the International Law Commission commented that "...a consistent practice, establishing the common consent of the parties to the application of the treaty in a manner different from that laid down in certain of its provisions, may have the effect of modifying the treaty.

> ...As to the case of modification through the emergence of a new rule of customary law, [the commission] concluded that the question would in any given case depend to a large extent on the particular circumstances and on the intentions of the parties to the treaty. It further considered that the question formed part of the general topic of the relation between customary norms and treaty norms which is too complex for it

might be a regional customary law of the South China Sea region. Otherwise, the parties must apply Article 121(3) as a treaty obligation in good faith. Accordingly, the requirements of Article 31 of the Vienna Convention on the Law of Treaties concerning interpretation a treaty must be followed, i.e. a treaty must be interpreted with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.[89] Hence, the next section of this part will discuss this possibility.

3.1. Purpose of Article 121(3)

As defined in paragraph (1) of Article 121, an island is an area of land which is naturally formed, paragraph (2) further stipulates the equal legal effect of islands and continental land in generating maritime zones. However, if some islands are very small and do not sustain human habitation or have economic life, it is unreasonable for them to have all maritime spaces because this will cause a significant distortion in maritime delimitation. In this light, Article 121(3) is necessary to reduce the distortion by limiting the maritime zones of rocks. That is to say the purpose of paragraph (3) of Article 121 is to set out the conditions for islands in order to have equal status with other areas of land. This is a limitation to avoid distortion, not the expansion of maritime zones for every island.[90] Therefore, it is submitted that similar to the approach of paragraph (1), islands under paragraph (3) also need to be tested in the light of their natural attributes without any artificial addition. However, the two conditions of paragraph (3) stand individually, not in combination, i.e. an island which meets one of the two conditions will be entitled to all maritime zones.[91] Bearing in mind the purpose of the Article will be helpful in the interpretation of these conditions in fact.[92]

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to be safe to deal only with one aspect of it in the present article" (Yearbook of International Law Ccommission 1966, Vol.II, p.236).

[89] Article 31 of the Vienna Convention on the law of treaties provides that a treaty must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:

(a) any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;

(b) any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty."

[90] An analogy can be drawn here. If Article 60(8) on legal regime of artificial islands is stipulated to discourage nations from building artificial islands solely to expand their jurisdiction over the ocean resource, Article 121(3) should also be interpreted to discourage nations from populating their uninhabited insular possessions for the same purpose.

[91] In the *travaux préparatoires* of the 1982 LOSC, Article 121(3) was drafted as "...human habitation *and* economic life". If this phrase was kept in the official text, an island would have to qualify both conditions. However, the word "and" was replaced by "or". Therefore, meeting either of the two conditions will be

3.2. The effect of Article 121(3)

3.2.1. New customary international law superseding Article 121(3)

Customary law is unwritten international law based on a general and consistent practice of states accepted by them as legally binding.[93] In order to form a new customary law, two elements are required, namely state practice and *opinio juris*. It is generally agreed that state practice establishes customary law only if it is general and consistent.[94] Also, state practice must be accompanied by *opinio juris*, i.e. states act not only because of their concern of they "amount to a settled practice, but they must also be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it".[95]

Reviewing state practice relating to the application of Article 121(3), one can find both compliant and resistant state practice. State practice can be seen from unilateral legislation, bilateral treaties and judicial decisions. Compliant state practice can be seen from an example that in 1997, after United Kingdom ratified the 1982 LOSC, it redefined the fishery limit off Rockall of 200 nautical miles from the stipulation in the Fishery Limit Act of 1976.[96] By issuing a reservation with the view that rocks and small islets should be

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enough for an island to generate all maritime zones. For details, see UNCLOS III, *Official Records,* Vol. III, p.195 (The replacement of the word "or" was introduced in the third session of the conference in the Informal Single Negotiation Text.) However, the Norwegian translation of Article 121(3) only uses a comma to separate the two conditions of the Article. This comma can be interpreted to imply in Norwegian grammar that the two conditions must both be fulfilled. For details, see Marius Gjetnes, "The Spratlys: Are They Rocks or Islands?" (2001) 32 *ODIL,* 191 at 194; Also, during the negotiation of UNCLOS III, Denmark was strongly in favour of the interpretation that the word "or" means "and". (Statement of Denmark, *The Law of the Sea, Regime of Islands - Legislative History of Part VIII (Article 121) of the UN LOSC* (UN Office for Ocean Affairs and the Law of the Sea,1988), p.107.

[92] Purpose is one of the requirements for interpretation a treaty under Article 31 of the Vienna Convention on the Law of Treaties.

[93] Ian Brownlie, *Principles of Public International Law* (Oxford: Oxford University Press, 6th ed., 2003), p.6; Malcolm Shaw, *International Law,* (Cambridge: Cambridge University Press, 5th ed., 2003), p.68; and Nancy Kontou, *op.cit.*, note 88, p.2.

[94] Ian Brownlie, *ibid,* p.7; Shaw, *ibid,* p.70 and Kontou, *ibid,* p.3.

[95] *North Continental Shelf Case*, ICJ Report (1969), p.3 at para.77. This is also the spirit of the judgment in the *Lotus* case (1927), PCIJ Series A, No.10 at 28; For further discussion, see Lauterpacht, *The Development of International Law by the International Court,* (London: Stevens & Sons Limited, 1958), p.379-81; Ian Brownlie, *op.cit.*, note 93, p.8-10; Shaw, *op.cit.*, note 93, p.71 and Nancy Kontou, *op.cit.*, note 88, p.5.

[96] The United Kingdom indirectly stated the 200 nautical miles fishery zone for Rockall in the attached nautical chart of the Fishery Limits Act of 1976 (reprinted in 2 F.F. Durante & W. Rodino, *Western Europe and the Development of the Law of the Sea* (United Kingdom) L.22.12.1976 (1984)), cited in Jon Van Dyke, Joseph R. Morgan and Jonathan Gurish, "The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?" (1988) 25 *San Diego L. R.*, 425 at 453 and Clive R. Symmons, *The Maritime Zones of Islands in International Law,* (The Hague: Martinus Nijhoff Publisher Press, 1979), p.117-8.

ignored in maritime delimitation, Taiwan also expressed its view that these features could not generate maritime zone, thus indirectly supporting Article 121(3).[97] Also, in some bilateral maritime delimitation agreements, states have made distinctions between rocks and islands. The common trend is to consider whether the island sustains human inhabitation or economic life, and if not to reduce or give it no effect in maritime delimitation. This can be seen from the case of Natuna Islands in maritime delimitation between Indonesia and Malaysia,[98] Kharg Island in the maritime delimitation between Iran and Saudi Arabia,[99] the Evout, Barnevelt and Horn Islands in the Beagle Channel between Argentina and Chile,[100] Malpelo Island in the maritime delimitation between Colombia and Panama[101] and many others. In addition, many decisions of the ICJ and arbitration, although not explicitly supporting Article 121(3), were not against the Article. This can be seen from the approach of the *Eritrea/Yemen Arbitration*,[102] *Qatar v. Bahrain*[103] and *Cameroon v. Nigeria cases*[104] in which small formations are considered a source of distortion, thus are given a reduced effect in maritime delimitation. These decisions and awards took a

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[97] Point 1 in the 1970 reservation of Taiwan to the 1958 Convention on the Continental Shelf. For full text, see (1971) 10 *ILM* 452.

[98] The Natuna Island of Indonesia was given reduced effect because of their remoteness and small size. For discussion, see Jayewardene, *The Legal Regime of Islands in International Law,* (Dordrecht, Boston, London: Martinus Nijhoff Publisher, 1990), p.418-9 and Jonathan I. Charney and Lewis M. Alexander, *International Maritime Boundaries,* (Dordrucht, Boston and London: Martinus Nijhoff Publishers, 1993, Vol.1), Report 5-9(1), p.1019.

[99] The equidistance line in the northern sector of the boundary was modified in order to give the Kharg Island half effect whereas other small islets located near the mainland was disregarded in the delimitation between Iran and Saudi Arabia. For discussion, see Jonathan I. Charney and Lewis M. Alexander, Vol. 2, *ibid*, Report, 7-7, p.1519.

[100] They are small Chilean islets lying in the Atlantic waters off the Argentina coast of Tierra del Fuego in the Beagle Channel. The resolution of the dispute limited the Chilean maritime claim by giving them less than full effect. For details, see Treaty of Peace and Friendship between Chile and Argentina, (1985) 24 *ILM,* 11 at 12.

[101] The Malpelo Island and dependent islets are 'wrong side' features lying approximately 245 and 190 miles from Colombian and Panamanian coasts respectively. The maritime boundary divided the water between the Malpelo and Panama according to the ratio 1:2 in favour of Panama. Thus, it appeared that the parties gave Malpelo a reduced effect in maritime delimitation due to its small size and distant location from the Colombian coast. This also ensured an equitable solution and took into account the general direction of the coast of Panama. For discussion, see Jayewardene, *op.cit.,* note 98, p.450-1 and Jonathan I. Charney and Lewis M. Alexander, *op.cit.,* note 98, Report, 2-5, p.519.

[102] Although the Tribunal in this case consider that the mid-sea islands could not be discounted altogether, and had somehow weighted in maritime delimitation, the single island of Al-Tayr and the island group of Al-Zubayr were given no effect in median line boundary in the Northern Stretch (*Eritrea/Yemen Arbitration Awards*, especially at paras.83 and 138-158).

[103] In this case the presence of a tiny island, Qit'at Jaradah, was a relevant circumstance in maritime delimitation. With the delimitation line passing immediately to the east of it, it was submitted that the Court was of the view that due to its small size Qit'at Jaradah was not given full effect. For full text of the Judgment, see *Qatar v. Bahrain,* ICJ Reports, 2001, p.40 at para.219.

[104] In this case, the effect of Bioko Island was ignored in maritime delimitation (*Cameroon v. Nigeria*, ICJ Reports, 2002, paras.298-9).

consistent view in reducing the effect of small insular formations in maritime delimitation, i.e. although not directly stated in these judgments, Article 121(3) was followed.

In addition to compliant practice, there are number of other examples which are not inconformity with Article 121(3). This can be seen from the claims of full maritime zones for small features such as the Aves Island of Venezuela,[105] the Northwestern part of Hawaii of the United States,[106] the Ceva-i-Ra of Fiji,[107] L'Esperance Rock of New Zealand,[108] etc.[109] These islands are claimed to have extensive maritime zones, even though they are uninhabited and do not really have an economic life of their own and some of these claims have been successful, e.g. the Aves Island of Venezuela receive recognition from many parties concerned.[110]

It can be argued that the degree of state practice which conforms with Article 121(3) far exceeds the resistant state practice, and thus the contrary practice could not amount to general and consistent state practice. Furthermore, the states who have claimed extensive maritime zones for small features have not shown their belief in a legal right in doing so and thus there is a lack of *opinio juris*. Therefore, it is submitted that the resistant state practice to Article 121(3) has not formed a new customary international law to supersede the treaty rule of the article. However, the contrary state practice to Article 121(3) did prove that there is a divergence in the application of the article and Article 121(3) is not implemented consistently. Moreover, the violation of states, even the parties to the 1982

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[105] Aves Island is situated centrally in the Eastern Caribbean, 435 kilometres away from the nearest Venezuelan territory. The island measures about 585 metres in length and at it narrowest point 30 metres in width. It was claimed and recognised to generate full maritime zone in the maritime delimitation between Venezuela and Puerto Rico without any consideration under Article 121(3).

[106] The Northwestern Hawaiian Islands include a number of small bits of land extend in a long chain, namely the Nihoa Island, Necker Island, French Frigate Shoals, Gardner Pinnacles, Maro Reef, Laysan Island, Lisianski Island, Pearl and Hermes Atoll, Midway Island and Kure Atoll. Although some of these islands are only suitable for small plants, such as coconut tree and brush and all are not capable for current habitation, the United States still claims their EEZs.

[107] The Ceva-i-Ra is a six and a half acres sandy cay located about 300 miles from the nearest Fijian territory. This is also uninhabited islet, but Fiji still claims its full maritime zone in order to protect its interests in fishery and mineral resources.

[108] L'Esperance Rock is the uninhabited insular formation in the southernmost of the Kermadec Islands group which lies some 600 miles from the North Island of New Zealand. The only inhabitants on the entire 'rocky group' of islands are about ten staffs of the meteorological station on Raoul, the northernmost islet in the chain. However, New Zealand claims that the L'Esperance Rock generates its own 200 nautical mile zone on New Zealand's maps. This claim seems contradict with Article 121(3) because New Zealand wants to protect the fishing and mineral resources in the area.

[109] For further discussion of these state practices, see Jon Van Dyke *et al.*, *op.cit.*, note 96, p.451-463 and Barbara and Soons, *op.cit.*, note 87, p.177-8.

[110] The claim of Venezuela was recognised by US, France and the Netherlands.

LOSC, e.g. the South China Sea states, shows that Article 121(3) is not considered as legal obligation. Hence, without consistent state practice and *opinio juris* Article 121(3) has not yet become customary international law either. Article 121(3) is only a treaty obligation for the member states of the 1982 LOSC.

3.1.2. New regional customary law superseding Article 121(3) in the South China Sea region

The elements for regional custom were pronounced in the *Asylum cases.*[111] Differing from international customary law whose scope is global, regional customary law is considered applicable to a particular area. If such a regional customary law exists in the South China Sea region, according to the principle of *lex posterior derogate legi priori,* when two rules on the same subject-matter differ in their contents, the rules originating later in time will prevail. Therefore, in this case, if the regional customary rule of the South China Sea region concerning the legal status of small islands is established after the time when the parties ratified the Convention, this customary rule will supersede the rule of Article 121(3) of the Convention. Otherwise, if the resistant regional practice is before the time of ratification, the rule of Article 121(3) will prevail. Ratifying the Convention may indicate that the parties have abandoned their previous practice. However, as between treaties and customary, the rules of one source may supersede rules of the other, the ratification of the Convention may not prevent the parties from building up a contrary practice, and the rule of the Convention may be superseded again once this practice is firmly established as new regional customary rule of law.[112] In order to examine the existence of such a regional customary in the South China Sea region, this section will analyse the two requirements for the establishment of a

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[111] *Asylum Case (Columbia/Peru), Judgment,* ICJ Report (1950), p.266. The Court in this case held that "the party which relies on a custom of this kind must prove that this custom is established in such a manner that it has become binding on the other party... The facts brought to the knowledge of the Court disclose so much uncertainty and contradiction, so much fluctuation and discrepancy in the exercise of diplomatic asylum and in the official views expressed on various occasions, there has been so much inconsistency in the rapid succession of conventions on asylum, ratified by some states and rejected by others, and the practice has been so much influenced by considerations of political expediency in the various cases, that it is not possible to discern in all this any constant and uniform usage, accepted as law..." (p.276-7, ICJ Report, 1950). For discussion, see Lauterpacht, *op.cit.,* note 95, p.381-4.

[112] For further discussion, see M.E. Villiger, *ibid,* p.34-6 and N.Kontou, *ibid,* p.16-36. Concerning the relationship between customary law and treaties, there is another principle of *lex specialis derogate legi generali, i.e.* a more special rule may prevail the general rule. However, as the regional customary law and the treaty rule of Article 121(3) are regulating the same subject of the legal status of small islands, the application of this principle is not relevant in this case.

regional customary law, namely general and consistent state practice and *opinio juris* within the region.

Examining the state practice in the South China Sea region, it seems that the littoral states concur in giving full maritime zones for all the islands of the Spratlys. Regarding China's position, as the mainland of China is far from the Spratlys, its claim to a large area of maritime zones in the South China Sea may only result from two possibilities, namely historic waters[113] or from the maritime zones of the Spratlys.[114] The Philippines and Malaysia also seemingly support the view of extensive role as it is reported that Malaysia has built a tourist resort with an air strip on an uninhabited island.[115] Therefore, it can be argued that common state practice of the littoral states in the South China Sea region in giving extensive maritime zones for uninhabited features might form a new regional customary law. However, the regional state practice is not clearly made with the aim to generate extensive maritime zones for the features of the Spratlys. Furthermore, regional state practice lacks the consistency and *opinio juris* elements as the parties oppose each other's claims to extensive maritime zones.[116] In addition, other states due to the concern of international navigation also oppose the claims of the littoral states.[117] Hence, the claims of extensive maritime zones of the parties is a violation their treaty obligation, rather than forming a new and contrary regional customary law.

Without any superseding customary international and regional law, Article 121(3) still has binding effect on the parties in the South China Sea dispute.

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[113] In the Declaration on Territorial Sea of 1958, China applied the straight baselines to both the Paracels and the Spratlys. From these baselines, it was inferred that China might claim full maritime zones for the two archipelagos. This point of view was repeated in other recent legislation of China, namely the 1992 Territorial Sea Law (Article 2) and 1996 Declaration when the country accessed to the 1982 LOSC.

[114] That means that the claim to maritime zones is based on a claim to maritime zones of the Spratlys themselves, i.e. to a certain extent the Spratlys must qualify under Article 121(3) to generate all maritime zones.

[115] The construction in the Swallow Reef, see the picture *infra* at Figure 11. With such construction, Malaysia seems to have turned the Swallow Reef from an uninhabited feature to an island which can sustain human habitation and has economic life in the form of tourism and thus it may be claimed to generate full maritime zones.

[116] For example, the dispute over the concession of China in the Vanguard Bank led to the opposing claim of Vietnam that there was no possibility for China to extend its maritime zone to Vanguard Bank, even if China were successful with sovereignty claim to the Spratlys, i.e. Vietnam opposed the possibility that the Spratlys could generate extensive maritime zones.

[117] For example the US stated that "the United States would, however, view with serious concern any maritime claim, or restriction on maritime activity, in the South China Sea that was not consistent with international law, including the 1982 United Nations Convention on the Law of the Sea". Statement made by Christine Shelly, Acting Spokesperson of the US Department of State on 10 May 1995. For full text, see "State Department Regular Briefing" *Federal News Service,* 10 May 1995.

3.3. Difficulty in interpretation and application of Article 121(3)

3.3.1. The role of 'size' of islands in travaux préparatoires and state practices in the application of Article 121(3)

Article 121(3) provides that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf". The 1982 LOSC does not clarify the definition of rock, but from the stipulation of Article 121(3), one can argue that in terms of size, rock must be smaller than island, thus not qualifying to generate all maritime spaces. This assumption is clear when one examines the *travaux préparatoires* of the Article. During the *travaux préparatoires* of the Article in the 1982 UNCLOS, the size of island, a quantitative criterion, was recommended. For example, in the draft of the group of 14 African states, the size of islands was considered as one of the relevant factors to determine the maritime spaces of islands.[118] Romania also proposed a clear distinction among islets, small islands and large islands and 'less than 1 square kilometre' was suggested to differentiate islets from islands.[119] Unfortunately, these efforts were not successful and the size of islands was not one of the criteria of Article 121(3) to determine the capacity of islands to generate maritime zones.

Although not being an explicit criterion in the text of Article 121(3), from state practice and case law, the size of island still has certain significance in clarifying the application of this article. For example, in the *Jan Mayen case,*[120] as the Jan Mayen Island is 54.8 kilometres length, the ICJ stated that because of its size alone Jan Mayen is not a rock.[121] This means, in terms of size, if an island is big enough, it may avoid the test of Article 121(3) and enable it to generate all maritime zones. On the other hand, the case of Rockall with a size of 0.624 square kilometres is assumed to be an example of a typical rock.[122] However, this assumption is still controversial, as it has not been confirmed by other state practice and judgments of the ICJ. A similar controversy was seen in the arguments for maritime spaces of a tiny island, the Aves Island. With a size of approximate 0.066 square kilometres (550 metres length and 120 metres

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[118] Center for Oceans Law and Policy, University of Virginia School of Law, *The UNCLOS 1982: A Commentary,* (Martinus Nijhoff Publishers, 1995), p.329 and 334.
[119] *Ibid,* p.332.
[120] ICJ Reports (1993), p.34 at para.80.
[121] *Ibid,* para.61.
[122] See E.D Brown, "Rockall and the Limits of National Jurisdiction of the UK" (1978) *Marine Policy,* Part I, 205-208; E.D. Brown, *Seabed Energy and Minerals: The International Legal Regime: The Continental Shelf,* (Dordrecht: Martinus Nijhoff Publisher, Vol.1, 1992), at p.39; Churchill and Lowe, *The Law of the Sea,* (Manchester University Press, 3rd ed., 1999), at p.50; Clive R. Symmons, *op.cit.,* note 96, at p.41.

at the widest), Venezuela claims that the island has full maritime effect to generate all maritime spaces. This claim was recognised by US, France and the Netherlands but was opposed by all other Caribbean states.[123] Therefore, the consensus on the minimum size of island that meets the test of Article 121(3) in state practice has not yet been reached.

In an attempt to clarify the size of islands in the application of Article 121(3), a reference to the definition of the International Hydrographic Bureau that small islets are from 1-10 square kilometres, islets are from 10-100 square kilometres and islands are from 100 – 5x106 square kilometres was made.[124] Rocks in Article 121(3) are argued to be smaller than small islets, thus according to this hierarchy, rocks must be less than 1 kilometre.[125] In order to clarify rocks and islands, Hodgson suggested that rocks should be less than 0.001 square mile, thereafter, islets from 0.001-1 square miles, isles from 1- 1000 square miles and islands from larger than 1000 square miles.[126] From the definition of the International Hydrographic Bureau to the suggestion by Hodgson, rocks are nearly 400 times greater or smaller in terms of size. Therefore, it is difficult to conclude which figure will be used to define rocks.

With regard to the relation between size and the application of Article 121(3), Jan Mayen is the only one in case law so far having all maritime zones without the test of Article 121(3). Given the approach to Jan Mayen, uninhabited islands such as the Spratlys, the biggest of which is of about 0.46 square kilometres, 100 times smaller than Jan Mayen, can safely be presumed to have to fulfil the other tests.

3.3.2. The difficulties in interpreting the ability to sustain human habitation and economic life of their own

The test of paragraph 1 of Article 121 of the 1982 LOSC distinguishes between islands, low tide elevation and other features. Paragraph 2 of the Article 121 continues by a declaration that an island *may* generate all maritime zones. The conditions of having all maritime zones are at paragraph 3 that "[r]ocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf'. This implies that rocks will

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[123] CIA fact book online at: http://www.cia.gov/cia/publications/factbook/geos/ve.html (accessed on 17 April 2005).
[124] Hart Dubner, "The Spratly "Rock" Dispute- A "Rockapelago" Defies Norms of International Law", 9 (1995) *Temp Int'l & Comp. L. J.*, 291 at 303.
[125] *Ibid.*
[126] Robert D. Hodgson, (Geographer of the Bureau of Intelligence and Research, US Department of State) "Islands: Normal and Special Circumstances" in Gamble J.K. and Pontecorvo G. (eds), *Law of the Sea: The Emerging Regime of the Oceans,* (Ballinger Publishing Company, 1974), 137 at 150 and 151.

have only internal water, territorial sea and contiguous zones, while other islands will have all maritime spaces. The key criteria for this distinction are the two conditions, namely the ability to "sustain human habitation" and "economic life of their own".

Relying on the conditions set by the Article 121(3) to classify which islands qualify as generating all maritime zones is even more difficult and controversial because the two conditions of Article 121(3) are worded in a vague and imprecise manner, with no quantitative criteria to assert what will constitute either "sustaining human habitation" or "economic life".[127]

With regard to "sustaining human habitation", the issues which will be raised in application are contained in the interpretation of each word in the phrase. First, "human" in the condition refers to ordinary people, i.e. the presence of civilians or military troops or scientific staffs will be accepted. Although there is a suggestion that only civilians qualify as human in this consideration,[128] it is still difficult in the case that the habitation of a civilian is a result of an encouraged and subsided policy of a government in order to make a small island qualify under Article 121(3). Second, "habitation" may be interpreted as covering both long term habitation and short shelter.[129] In order to qualify, the meaning of habitation, the number people inhabiting an island, is another controversial issue. There is a suggestion that 50 people are the minimum number to be considered as "habitation",[130] but from the *travaux préperatoires* and state practice, there is no evidence to confirm that suggestion.[131] Finally, the ability to "sustain" refers to the actual ability, i.e. the existence of human habitation in the past and the present, or a possibility in the future is enough for the requirement of paragraph 3. If the capacity to "sustain human habitation" is accepted for

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[127] For a discussion of the difficulty in interpreting this Article, see Charney, "Rocks Cannot Sustainable Human Habitation" 93(1999) *AJIL*, p.863-77 and Kwiatkowska and Soons, *op.cit.*, note 87, p.139-181. Brown commented on the wording of Article 121(3) that "in its present form, Article 121(3) appears to be perfect recipe for confusion and conflict". For further, see Brown E.D., "Rockall and the Limits of National Jurisdiction of the UK" (Part I) (1978) *Marine Policy*, p.181 at 206.

[128] Marius Gjetnes, *op.cit.*, note 91, 191 at 195.

[129] Long habitation refers to a stable community of people who are permanently living in the island. Short shelter may be the visiting of fishermen or the sending of occasional explorers or scientists to conduct some research.

[130] Jon Van Dyke *et al.*, *op.cit.*, note 96, at 438. The authors considered that five persons would be too few to constitute a stable community, but fifty could very well serve as a population of sufficient size. Karagiannis went even further to suggest that the presence of one person on an island may provide an indication that the island can support human habitation. For further, see Karagiannis, "Les Rochers Qui ne se Prêtent pas à l'Habitation Humaine ou à une Vie Économique Propre et le Droit de la Mer" (1996) 29 Revue Belge de Droit International, 559-624 at 573-574.

[131] In fact, many islands with extensive maritime zones do not have 50 persons living on them. For example, Jan Mayen of Norway.

the future, which conditions will be required for having that capacity? Dealing with this problem, many scholars believe that the availability of vital conditions for human living such as fresh water, cultivated land, food and shelter is a decisive test.[132] However, with the development of modern technology, the conditions which allow human living may change and thus claimants may not need the availability of all these conditions.[133]

With regard to the second criteria of Article 121(3), it is not clear whether 'economic life of its own' means economic significance or economic resources of the island. If it means economic significance, it is hard to say that any island possesses no economic significance because of the potential resources of the surrounding sea water. If economic life requires the presence of economic resources, whether it requires the availability of valuable natural resources on the island itself or just the availability of valuable natural resources in the adjacent waters around the island is sufficient to qualify the article.[134] In addition, if economic resources are accepted in surrounding water, what extent of waters will be considered as adjacent, within territorial sea or within exclusive economic zone?

The difficulty in interpreting the Article 121(3) leads to different approaches for the legal regime of tiny islands,[135] especially for the case of the Spratlys. Whatever the approaches are, the interpretation of the article must be "in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose".[136]

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[132] The specific description of conditions for human habitability was initially developed by Gidel, see Clive R. Symmons, *op.cit.*, note 96, at 46, referring to Gidel B., *Le Droit International Public de la Mer* (1934) at 684. Then this was mentioned in all discussions on the meaning of 'human habitation' in Article 121(3).

[133] For example, some devices will allow people to live by rain water instead of fresh water.

[134] For example, Charney argued that having economic resources in the adjacent water is enough for islands to pass this test of Article 121(3). For details, see Charney, *op.cit.*, note 127, 863-878.

[135] This can be seen from inconsistent state practice in claiming maritime zones for small and inhabited islands. It is because some states are not the members of the 1982 LOSC, or despite being members of the Convention, still make a claim due to the economic interests in ocean resources. For example, the United States claims full effect for some small and inhabited islands in Northwestern Hawaii (For details, see Jon Van Dyke *et al.*, *op.cit.*, note 96) and Venezuela claims full maritime zones for the Aves Island (For further, see CIA fact book online at: http://www.cia.gov/cia/publications/factbook/geos/ve.html (accessed on 17 April 2005)), also in Alex G. Oude Elferink, "Clarifying Article 121(3) of the Law of the Sea Convention: The Limits Set by the Nature of International Legal Process" (1998) *Boundary and Security Bulletins*, 58 at 61.

[136] Article 31 of the Vienna Convention on the Law of Treaties, 1969.

3.4. A better view for the application of Article 121(3) in the case of the Spratlys

Due to the complexity of interpreting Article 121(3), there are many different approaches to its application to the islands in the South China Sea. Some consider that all islands of the Spratlys are too small to generate all maritime zones and thus they only have internal water, territorial sea, and contiguous zones. Other may argue that due to the significance in terms of economic life, i.e. the presence of oil and fishing resources, although they are tiny in size, all islands in the Spratlys are still eligible for all maritime zones. Between the two extreme approaches is a middle approach of interpreting Article 121(3) in the case of the Spratlys in order to reach an understanding that some, but not all, islands which qualify to have all maritime zones.

Different approaches arrive at different results, but they do not give a decisive answer on which how many features, if any, of the Spratlys would qualify under Article 121(3). In general, based on the results of these arguments, the approaches can be examined and assessed in three main groups as follows:

3.4.1. All islands of the Spratlys qualify under Article 121(3)

This approach is the result of a broad interpretation of Article 121(3).[137] According to this approach, in order to meet the condition of sustaining human habitation, the shelter of fishermen during fishing trips will be taken into account. Moreover, the second condition of economic life is understood as economic significance. This means that if an island is important in terms of economic resources in its surrounding water, it will be entitled to generate all maritime spaces.[138] Applying these interpretations to the Spratlys, many islands were used for shelter for fishermen in the region, especially for fishermen from China and Vietnam. The adjacent waters around the Spratlys are great important as they contain great potential for hydrocarbon resources. They are also known as rich in fishing and guano resources, which have been exploited by states in the region for a long time. Islands in the

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[137] This approach may be implied from the claim of China to a vast area of the South China Sea. As this area is too far from the mainland of China, if it is not considered within the historical water, it must be maritime zones of the features of the Spratlys. Iain Scobbie also supports this position of China by his arguments of maritime zones of the Spratlys. For details, see Iain Scobbie, "The Spratlys Islands Dispute: An Alternative View" (1996) 5 *Oil and Gas Law and Taxation Review,* 173 at 180-182. For further discussion of China's claim to historical water, see *infra,* Chapter 4.

[138] From the argument of Charney that the "economic of its own" can be understood that of the adjacent water, all Spratlys features should have all maritime zones as the surrounding water is of very importance. For Charney's arguments, see Charney, *op.cit.,* note 127.

Spratlys are also attracting tourism.[139] All this economic significance suggests that if based on an extremely broad interpretation, all islands of the Spratlys must have all maritime spaces.

3.4.2. None of the islands of the Spratlys qualifies under Article 121(3)

In contradiction to the broad approach, there is another trend in clarifying the legal status of islands in the Spratlys. This approach is based on a strict interpretation of Article 121(3) to the situation of the Spratlys. So far, in the Spratlys, there is no long-term habitation. All the islands in the Spratlys are very small in size and located far away from the mainland of littoral states. Therefore, it is difficult to manage and exploit the resources of the islands.[140] Based on this argument, Gjetnes concluded that all islands in the Spratlys were rocks under the classification of Article 121(3).[141] Valencia, although he did not examine in detail the conditions of the Spratlys in comparison with the stipulation of Article 121(3), also asserted that "in terms of international law, logic and practicality...the extended zones [for islands of the Spratlys] should not be permitted".[142]

3.4.3. Some islands of the Spratlys qualify under Article 121(3)

This third approach results from the interpretation and application of the two conditions of Article 121(3) to the features of the Spratlys.[143] The thesis will argue that this is the best approach for the application of Article 121(3) to the case of the Spratlys. It is the vital importance for the legal regime of the Spratlys, this argument will be examined in details in the next section.

3.5. Twelve islands of the Spratlys qualify under Article 121(3): The most generous approach

With regard to "sustaining human habitation", the issues which will be raised with regard to its application are (i) whether "human" means civilian or whether the presence of

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[139] For analysis on the importance of the water in terms of economic resources, see *supra*, Chapter 1.

[140] Gjetnes also argues that so far the only resource available in the features of the Spratlys is guano. This resource was exploited in the 1930s. For details of the examination of the conditions of the Spratlys to qualify under Article 121(3), see Marius Gjetnes, "The Legal Regime of Islands in the South China Sea", Masters Thesis of Law, Department of Public and International Law, University of Oslo, 2000, p.48-92; Although not directly analysing on the case of the Spratlys, Charney in his general comment on the legal regime of islands under Article 121(3) also believed that some features would previously have been entitled to extended maritime zones but today may fall within the Article 121(3) definition as rocks with the ending of a natural resource, e.g. guano. For further, see Charney, *op.cit.*, note 127, p.867.

[141] *Ibid.*

[142] Valencia *et al.*, *op.cit.*, note 16, p.45.

[143] Alex G. Oude Elferink supports this interpretation and suggests that the Itu Aba, Spratly and Thi Tu Islands in the Spratlys may qualify under the test of Article 121(3). For details, see Alex G. Oude Elferink, *op.cit.*, note 78, at 178.

military troops or scientific staff will also be accepted, (ii) whether "habitation" means long term habitation or whether short shelter can also be taken into account, (iii) whether "sustain" refers to the habitation of humans in the past, the present, or the future, and if the capacity to "sustain human habitation" is accepted for the future, which conditions will be required for having that capacity.

As for the first question, as the conditions of islands must be natural in the test of Article 121,[144] the presence of military troops and scientific staff will not qualify. Military troops are on special duty and implement the political decisions of governments. Their presence is a matter of state direction rather than habitation. If the presence of troops is to be accepted under Article 121(3), all governments will order their troops to occupy all the islands, even islands not capable of habitation, and thus the purpose of the article will not be achieved. The special duty can also be seen in the work of scientific staff. Due to the requirements of their research, scientific staff have to stay in the field of their work even if the place is a desert or anywhere else that cannot support human habitation. Therefore, similar to the presence of troops, the presence of scientific staff should not be taken into account in considering human habitation. Human habitation should be understood as habitation by a settled population. Hence, in this case, the presence of troops and some scientific staff in some lighthouses or weather stations in features of the Spratlys will not be considered as human habitation.[145]

With regard to the second question, from the *travaux préparatoires* of the article, the phrase "cannot be inhabited (permanently)" is used as one of the criteria to distinguish islands from islets.[146] This means that temporary habitation such as seeking shelter during the fishing season does not qualify as habitation under Article 121(3).[147] In the case of the Spratlys, the

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[144] Charney, however, argued that the text of paragraph 3 of Article 121 does not specify that the conditions set out must also exist naturally like the requirement of paragraph 1. For details, see Charney, *op.cit.*, note 127, p.867. However, if this argument is accepted, states will find it easy to change the conditions of all their tiny islands in order to pass the test of Article 121(3), thus in fact Article 121(3) will be meaningless. Hence, it is submitted that the two conditions of Article 121(3) must also be tested under the natural condition of the islands as under paragraph 1.

[145] This is also the views of Mark Valencia *et al.*, *op.cit.*, note 16, p.42; Clagett, Brice M. "Competing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the South China Sea." 10 (1995) *Oil Gas Law and Taxation Review* (UK), Part I, p. 375-88, at 386; Marius Gjetnes, *op.cit.*, note 91, at 195.

[146] Article 1 of Romania's Draft on definition of and regime applicable to islets and islands similar to islets. Document A/CONF.62/C.2/L.53 in United Nations, *Third United Nations Conference on the Law of the Sea: Official Record,* Vol.III, p.228.

[147] Jon Van Dyke and others also agree on the permanent nature of the habitation by referring to the term "stable community" and thus they suggest that the infrequent visits from interested scientists would not be sufficient to constitute a stable community. For further information, see Jon Van Dyke *et al.*, *op.cit.*, note 96,

historical record showed that the Spratlys were considered as little more than a dangerous ground for international navigation. There was no civilian habitation except the visiting of fishermen of the region when they had to avoid storms or seek shelter during a long fishing trip in the South China Sea and the short-term presence of some workers for guano exploitation. These activities did not lead to any long-term habitation of people in the Spratlys. Until the early years of this century, military troops and scientific staff were deployed in the archipelago to occupy islands and conduct marine scientific research. This means that there was no actual human habitation in the Spratlys in the past as well as the present. Therefore, the test for the first criterion of Article 121(3) will be left for the third question about whether 'sustain' refers to the habitation of humans in the past, the present or the future.

From the text of paragraph (3) the word "can" implies the ability to sustain rather than actually having human habitation.[148] This means that even if an island has not sustained human habitation in the past or present but has the ability to sustain human habitation in the future, it still qualifies under the test of Article 121 (3). In order to have such a capacity, an island, without any support from outside, must be able to provide the vital conditions for human living such as the presence of fresh water, cultivable soil and other resources.[149] Searching for the presence of these natural conditions in the Spratlys, there are some islands which do have fresh water and on which vegetables are found. These islands are Southeast Cay, Thitu Island, Loaita Island, Nanshan Island, Itu Aba Island, Sand Cay, Nanyit Island, Spratly Island, West York Island and Amboyna Cay.[150] This means that these islands have some conditions that may sustain human habitation in the future.

After examination of some of the natural conditions, it may be argued that with the new development of technology, people are finding more ways to live in such difficult conditions as those in the Spratlys. On the other hand, it is noted that even with the new

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p.438; Also in Jon Van Dyke and Dale L. Bennett, "Islands and the Delimitation of Ocean Space in the South China Sea" (1993) 10 *Ocean Yearbook* 54-89 at 79.

[148] Brown also agrees that "can" refers to capacity to sustain human habitation rather than the actual existence of human habitation. For details of the arguments see, Brown E.D., *op.cit.*, note 127, p.206. Also, in Charney, *op.cit.*, note 127, p.868 and Barbara and Soons, *op.cit.*, note 87, p.160-3.

[149] These are natural conditions requirement for an island initially listed by the definition of Gibel, and received support of all other scholars when they discuss on the vital criteria for human habitation. For details, see B. Gidel, *Le Droit International Public de la mer,* 1934, at 684.

[150] Results obtained from the statistic of David Hancox and Victor Prescott, *op.cit.*, note 35; Valencia *et al.*, *op.cit.*, note 16, Appendix 1, p.227; Alex G. Oude Elferink, *op.cit.*, note 78, p.169-190 and Joseph R. Morgan and Mark J. Valencia (ed.), *Atlas for Marine Policy in Southeast Asian Sea*, (University of California Press, 1983). For a statistic from these works, see Annex 1, *infra*.

development of technology, the features are required to have at least enough space for humans to stay without any artificial assistance. In the case of islands in the Spratlys, due to being very tiny in size, even with new technology, it is unlikely that some of the islands will be able to sustain human habitation without artificial assistance. The ten islands which are listed above are already based upon a very broad interpretation of the Article 121(3). They are listed even though they only have a potential capacity, illustrated by the presence of bushes and small vegetable. Therefore, it can be argued that the ten islands listed above are the maximum number of islands which qualify as being able to "sustain human habitation".

With regard to the second criterion of Article 121(3), "economic life", it is necessary to justify "economic life" in combination of the phrase "of its own" to answer (i) whether the "economic life of its own" requires the availability of valuable natural resources on the island itself or (ii) whether the availability of valuable natural resources in the adjacent waters around the island is sufficient for it to qualify under the article. The first assumption that natural resources must be available on the island itself is the strict interpretation of the text from Article 121(3). In this consideration, mineral resources will be accepted as valuable resources. With regard to the islands in the Spratlys, the availability of guano resources in some islands will enable those islands to pass the test of Article 121(3). These islands are Northeast Cay, Southeast Cay, Flat Island, Itu Aba Island, Spratly Island and Amboyna Cay.[151]

In the second approach, a broader interpretation is that economic life may derive from the economic resources of the adjacent waters of an island.[152] This interpretation will create controversy as the natural resources such as fisheries or potential for tourism are available in almost all ocean spaces. It is unlikely that there is some water which does not have any economic significance. Therefore, the broad interpretation will probably result in all features generating all maritime zones. This is not the spirit and purpose of Article 121(3) in avoiding inequality and distortion in maritime delimitation. Furthermore, in the case of the Spratlys, as many small features are located close to the others (most of the distances between the features are less than 200 nautical miles) in a rich resource water, the natural resources in the adjacent waters already belong to the maritime zones of some bigger features (which qualify under Article 121(3)). If the

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[151] *Ibid.*

[152] Charney argued that economic life may include exploitation of the living and mineral resources found in the territorial sea as the sovereignty over the island includes the territorial sea and its natural resources. Moreover, if an island is used as a base for the exploitation of resources further offshore, it would be sufficient to establish "economic life of its own". Charney, *op.cit.*, note 127, p.868.

broad interpretation is applied, i.e. all features will have full maritime zones, it will not only create much overlapping among all the features, but will also give rise to a distortion as some of the islands such as Whitsun Reef is only a few rocks at high tide. Therefore, it is arguable that this broad interpretation should not be applied.

To combine the two tests mentioned above, there are two conditions that can enable some islands of the Spratlys to generate all maritime zones, namely (i) the availability of some vital conditions for human habitation in the future and (ii) the availability of natural resources on the islands. More concretely, the availability of fresh water, trees and guano resources are the elements to help the islands to pass the test of Article 121(3). A search for these elements occurring naturally within the Spratlys produces a list of 12 islands as follows:

Name	Natural conditions
Northeast Cay	Area: 685x90m; Height: 3m; Covered with grass and thick trees in 1963.
Southwest Cay	Area: 650x280m; Height: 4-6m; Covered with a 10 metre coconut tree, grass with low bushes and guano with considerable scale. Also, reported to have two wells.
Thitu Island	Area: 22ha; Height: 3.5m; Covered with low bushes, coconut palms and plantain trees.
Loaita Island	Area: 6ha; Height 2m; Covered with mangrove bushes in 1933, above which rose coconut palms and other small trees.
West York Island	Area: 500x320m (15 ha); Covered with mangroves and coconut palms (1963).
Itu Aba Island	Area: 960x400m (0.46km² or 46ha); Height: 5m; Covered with shrubs, coconut and mangroves in 1938 and have guano deposit.
Sand Cay	Area: 7ha; Height: 3m; Covered with trees and bushes in 1951.
Nanyit Island	Area: 104m²; Height: 6m; Covered with trees, bushes and grass.
Flat Island	Length from 90 to 210 m; A low flat, sandy cay with large guano deposits but no vegetation.
Nanshan Island	575m long, 2.5m height; Covered with coconut trees, bushes and grass in 1963.
Spratly Island	Area: 13-15ha; Height: 2.5m; Covered with bushes, grass, guano in 1963; Fringing reef is above water at low tide.
Amboyna Cay	Area: 1.6ha; Height: 2m; Sand and coral with guano deposits and little vegetation. Surrounded by fringing reef.

The examination of the two conditions of "sustaining human habitation" or "economic life of its own" confirms that although tiny in size, some islands in the Spratlys are still capable of generating maritime spaces under a permissive, but not maximalist, interpretation of Article 121(3).[153] On the one hand, if all maritime effect of the islands of the Spratlys is ignored, this

[153] This is a maximum effect of the interpretation of Article 121(3) which results in the most complicated scenario for the dispute but in fact, it might be not that much.

may make the maritime delimitation in the South China Sea more simple and practical.[154] Nevertheless, this is not the appropriate approach according to Article 121 as the article allows an island to generate maritime zones if it meets either of the two conditions of paragraph 3. On the other hand, if the emphasis is put on the significance of natural resources and the strategic position of the Spratlys in order to reach the conclusion that all the islands are able to generate maritime zones, this will lead to great distortion in maritime delimitation. As mentioned above, one of the purposes of Article 121(3) is to avoid the distortion in maritime delimitation caused by giving too much maritime space to a tiny island, thus giving full maritime zones for all islands will go against the purpose of Article 121(3). Therefore, although it will be difficult in practice, the better approach is to conduct the test of the two conditions in the context of the specific situation of the Spratlys to find out which islands in the Spratlys will probably have all maritime zones. As the requirements of Article 121(3) are either to "sustain human habitation" or have "economic life of its own", all islands which pass one of the two conditions will be able to generate all maritime zones. To combine the results from the tests of the two conditions, 12 islands of the Spratlys will have all maritime spaces, namely Northeast Cay, Southeast Cay, Thitu Island, Loaita Island, Flat Island, Nanshan Island, Itu Aba Island, Sand Cay, Nanyit Island, Spratly Island, West York Island and Amboyna Cay.

Of the three approaches on application of Article 121(3) in the case of the Spratlys, this approach provides the better way as it is based on the ordinary meaning of the terms of Article 121(3) and in line with the purpose and object of the 1982 LOSC. This is also the most generous outcome possible for the Spratlys to generate maritime zones.

4. Legal regime of low tide elevations and artificial features in the Spratlys

4.1. Legal regime of low tide elevations

The legal status of low tide elevations is not fully clarified in the 1982 LOSC, as low tide elevations are only mentioned in three articles relating to their possible use as base points.[155] With regard to the normal baseline, Article 13(1) of the Convention only stipulates that if "a low tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the mainland or an island, the low-water

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[154] This is the suggestion of the authors in Valencia *et al.*, *op.cit.*, note 16, p.45.

[155] For history of the stipulations about low tide elevations in international law of the sea before the 1982 LOSC, see Geoffrey Marston, "Low Tide Elevations and Straight Baselines" (1972-1973) 46 *BYIL* 405.

line on that elevation may be used as the baseline for measuring the breadth of the territorial sea". This implies that if a low tide elevation is located within 12 nautical miles, coastal states can exercise their sovereignty rights in using it as a basepoint.

Regarding straight baselines, Article 7(4) of the 1982 LOSC laid down a different requirement that "straight baselines shall not be drawn to and from low tide elevations, unless lighthouses or similar installations, which are permanently above sea level, have been built on them". Provided that the coastal states are entitled to apply the straight baseline method in accordance with the provisions of the law of the sea,[156] this provision implies that irrespective of its distance from the mainland or an island, any low tide elevation will qualify as a basepoint for a straight baseline if there is a lighthouse or similar installation which is permanently above sea level built upon it.[157] A similar requirement is included in the provision of Article 47(4) on the use of low tide elevations as basepoints for archipelagic baselines.[158]

Articles 13(1) and 7(4) suggest that low tide elevations, which are located within 12 nautical miles in the case of the normal baseline or are built upon with lighthouses or similar installations in the case of the straight baseline, are objects of territorial claims of coastal states for the use as basepoints. With the presence of such a low tide elevation, the territorial sea of the coastal state may be extended to 24 nautical miles (instead of 12 nautical miles) from the mainland or an island.[159] Hence, although having a limited role, low tide elevations in these circumstances are not worthless in terms of sovereignty and capacity to generate maritime zones.

In the other cases when a low tide elevation is located outside the breadth of the territorial sea from a mainland or an island as well as not qualifying as a basepoint for

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[156] Article 4 of the 1958 Convention on the Territorial Sea and the Contiguous Zone and Article 7 of the 1982 LOSC.

[157] For further discussion on the possibility of low tide elevations to serve as basepoints for straight baseline, see Roberto Lavalle, "Not Quite a Sure Thing: The Maritime Areas of Rocks and Low-tide Elevations under the UN Law of the Sea Convention" (2004) 19(1) *IJMCL*, 43 at 49-52.

[158] Article 47(4) of the 1082 LOSC says that archipelagic baselines "shall not be drawn to and from low-tide elevations, unless lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea from the nearest island."

[159] Churchill and Lowe, *op.cit.*, note 122, p.49.

straight baseline, it has no territorial sea of its own.[160] Thus, in these cases, low tide elevations are worthless in terms of capacity to generate maritime zones. However, this will not rule out the possibility that coastal states may use low tide elevations to build artificial islands. In this situation, the legal regime of the low tide elevation will be changed to that of an artificial island.[161]

With the recent judgement of the ICJ in the *Qatar v. Bahrain case*[162] the legal regime of low tide elevations has been developed. By recalling the rule of Article 13(2), the conditions for a low tide elevation to be used as a basepoint under Articles 13(1) and 7(4) and reviewing the current treaty law and state practice, the Court concluded that "the few existing rules do not justify a general assumption that low tide elevations are territory in the same sense as islands".[163] Even though low tide elevations can be used as basepoints under the provisions of Articles 13(1) and 7(4), "the law of the sea does not in these circumstances allow application of the so-called 'leap-frogging' method".[164]

The Court went further in examining the possibility of using low tide elevations in a disputed territorial sea, as in this case Bahrain made a sovereignty claim over the low tide elevation of Fasht ad Dibal and used it as a basepoint. Bahrain supported its claims by saying that when a low tide elevation was situated in the overlapping area of the territorial sea of two states, whether with opposite or with adjacent coasts, both states in principle were entitled to use its low water line for measuring the breadth of their territorial sea.[165] They also argued that for delimitation purposes the competing rights derived by both coastal states from the relevant provisions of the law of the sea would by necessity seem to neutralise each other. However, based on the view that low tide elevations could not be fully assimilated with islands and other land territory, the Court ruled that in the case of low tide elevations which are located in zones of overlapping claims, there was no ground for recognising the right of any party in the overlapping area to use the low water line of the low tide elevations as baselines.[166] Moreover, for the purposes of drawing the equidistance line, such low tide elevations had to be disregarded.[167]

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[160] Article 11(2) of the 1958 Convention on the Territorial Sea and the Contiguous Zone and Article 13(2) of the 1982 LOSC.
[161] The legal regime of artificial islands will be discussed later in this chapter.
[162] *Qatar v. Bahrain*, ICJ Reports (2001), p.40.
[163] *Ibid*, paras.206.
[164] *Ibid*, para.207. This method is allowed to apply in the case between two islands.
[165] *Ibid*, para.202.
[166] Although low tide elevations in *Qatar v. Bahrain* only located in the overlapping territorial sea, but para.209 did not narrow the limitation of the using such low tide elevations as basepoints in the overlapping

The conclusion of the *Qatar v. Bahrain* case can be used to supplement the provisions of Articles 13(1) and 7(4) that the use of low tide elevations as basepoints will not be applicable if the low tide elevations are located within an overlapping territorial sea area. The right of coastal states to the low tide elevation in this case will be decided through the process of maritime delimitation. In other overlapping maritime zones, namely the EEZ and the continental shelf, the rights of coastal states to low tide elevations, e.g. to build artificial islands, will not be affected. In a similar approach to the territorial sea, it is submitted that the rights of coastal states to these low tide elevations will also be decided by the result of the maritime delimitation.[168]

Also regarding the use of low tide elevations as basepoints in overlapping territorial seas, there is an exceptional possibility that a low tide elevation is located between two opposite mainland coasts or islands the distance between which is more than 24 but less than 36 nautical miles. In this case, if there is no low tide elevation situated within 12 nautical miles of the mainland or island of one coastal state, there will be no overlapping territorial sea, but it is the presence of such low tide elevations which creates an overlap. For example, in the case of the West Reef and Cuateron Reef, there would be no overlapping territorial sea between the two if the low tide elevation of Central Reef was not within the territorial sea breadth of the West Reef.

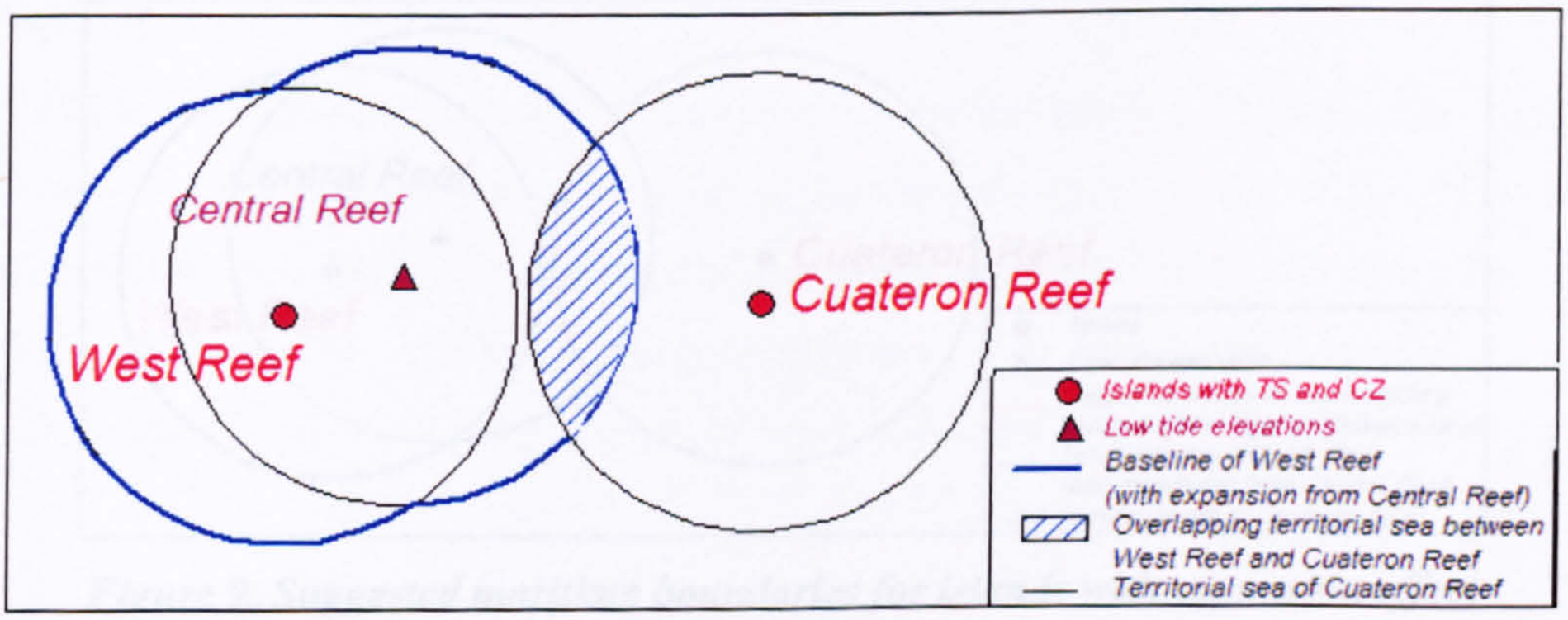

Figure 8. Exceptional effect of low tide elevation with regard to the overlapping territorial sea of islands[169]

territorial sea only. Therefore, it is submitted that low tide elevation cannot be used as base points if they are located in other overlapping maritime zones as well.

[167] ICJ Reports (2001), p.40, para.209.

[168] In the *Qatar v. Bahrain* case, after maritime delimitation, the Fasht ad Dibal is situated in the territorial sea of Qatar, thus Qatar has sovereignty over it.

[169] Map drawn by Mapinfo.

The *Qatar v. Bahrain* case did not deal with this situation. However, from the approach of the judgment that low tide elevations cannot be fully assimilated with islands and other land territory and that in the case of overlapping territorial seas, for the purpose of drawing the equidistance line, low tide elevations which are located within the overlapping area must be disregarded, it is recommended that in this situation the mainland or island without such low tide elevations should be given full effect. That means that after giving full effect to the opposite mainland or island, the mainland or island with such low tide elevations will have the remainder of the overlapping territorial sea, i.e. the low tide elevation still has some effect in expanding territorial sea for the coastal states. However, due to the presence of the opposite mainland or island within 36 nautical miles, this effect must be reduced. For example, in the case between the West Reef and Cuateron Reef mentioned above, the Cuateron Reef should have full effect of 12 nautical miles of territorial sea, while all the maritime zone generated from the Central Reef which does not overlap with that of the Cuateron will belong to the West Reef. Hence, the low tide elevation of Central Reef still can bring some extension in generating territorial sea for the West Reef but it is not given full entitlement, i.e. a full 12 nautical mile zone. Such extended maritime zones may not only comprise the territorial sea as in the case of West Reef, but also other maritime areas if the feature qualifies under Article 121(3).[170]

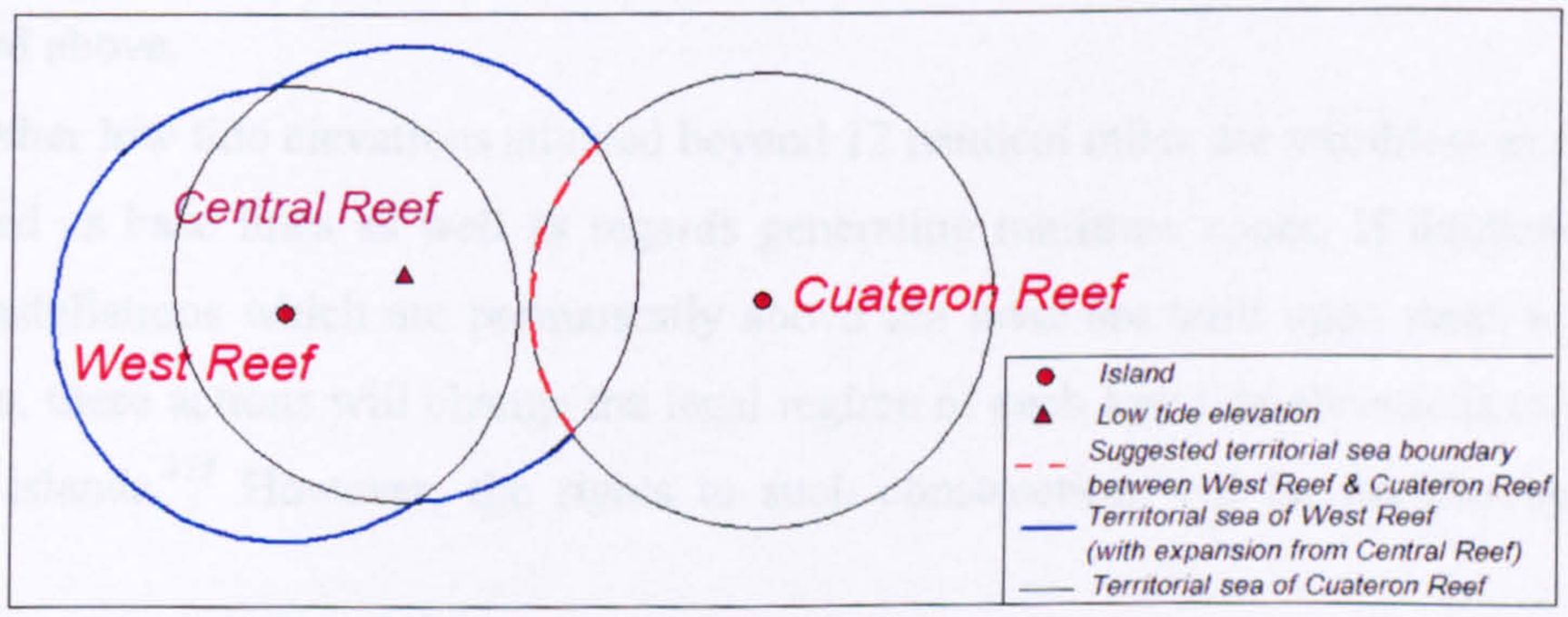

Figure 9. Suggested maritime boundaries for islands with expansion effect from low tide elevations[171]

[170] From the combination of Articles 121(3), 13 (on low tide elevations), 57 (on the breadth of EEZ) and 76 (on definition of the continental shelf), low tide elevations in this case may help extend all other maritime zones for features which qualify under Article 121(3). However, as *Qatar v. Bahrain* suggested that low tide elevations should not be used for baseline in overlapping areas, this scenario may not happen in the case of the Spratlys due to the close distance between the Spratlys' features. Even if this happens, it is illogical that much extended maritime space should result from just a low tide elevation. This may be because the Spratlys are an exceptional case with their complicated geographical situation.

[171] Map drawn by Mapinfo.

Applying these clarifications to the legal status of low tide elevations in the case of the Spratlys, low tide elevations which are located within 12 nautical miles from islands can be used as basepoints to expand their territorial seas. Figure 10 illustrates the territorial sea of islands in the Spratlys, and all low tide elevations located within 12 nautical miles from them. They are, namely the South Reef and North Reef in the North Danger Reefs; the Discovery Small Reef and Petley Reef in the Tizard Bank; the Ladd Reef and Central Reef in the London Reefs; the Johnson South Reef, Loveless Reef, Hughes Reef, Higgens Reef, Kennan Reef, Holiday Reef and Zhangxi Jiao in the Union Reefs and the Dallas Reef and Ardasier Reef for the Swallow Reef.[172] As they are located within the breadth of the territorial sea of islands, under Article 13(1) these low tide elevations can be used as basepoints. However, due to the short distance between some islands of the Spratlys, a large number of the low tide elevations which are located within the overlapping maritime zones of some islands[173] will have no effect in generating baselines for those islands. For example, the low tide elevations in the North Danger Reefs, Tizard Bank, Union Reefs and London Reefs may not be used to generate maritime zones, if the islands in each group belong to different states.[174]

With some low tide elevations which are located between two islands the distance between which is less than 36 nautical miles, e.g. the Central Reef, Dallas Reef and Ardasier Reef, the maritime delimitation should be decided as in the exceptional situation mentioned above.

Other low tide elevations situated beyond 12 nautical miles are worthless as regards being used as base lines as well as regards generating maritime zones. If lighthouses or similar installations which are permanently above sea level are built upon these low tide elevations, these actions will change the legal regime of such low tide elevations to that of artificial islands.[175] However, the rights to such construction will be decided by rules

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[172] Due to the small scale of the map, the Subi Reef on the map seems to be within the territorial sea breadth of the Loaita Bank, but in fact the distance from the Subi to the shortest island of Loaita Cay is 12.31 nautical miles.
[173] This will happen if these islands belong to different countries.
[174] For illustration of maritime zone of these groups and all features of the Spratlys, see figures 12-17, *infra*.
[175] There is also a possibility of using these low tide elevations with such constructions as basepoints in a straight baseline system under Article 7(4) of the 1982 LOSC. However, due to the short distance between some islands of the Spratlys and the presence of the twelve islands which may generate full maritime zones, a large number of the low tide elevations may be located within the overlapping maritime zones and thus according to *Qatar v. Bahrain* case, this possibility is unlikely.

concerning maritime delimitation, i.e. coastal states cannot build artificial islands on the EEZ and continental shelf of the other states.[176]

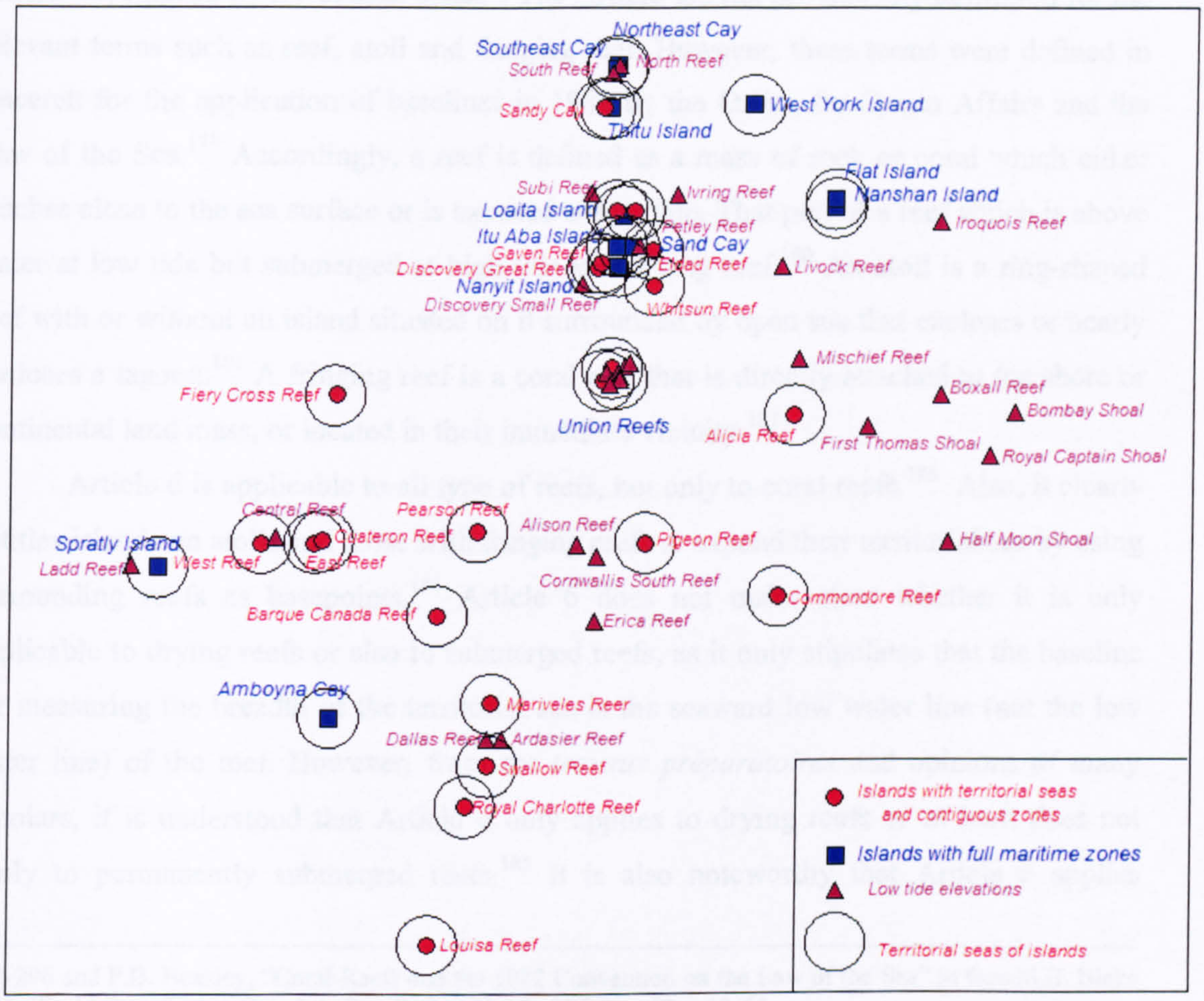

Figure 10. Territorial sea of islands in the Spratlys[177]

With regard to the effect of low tide elevations in generating basepoints, it is worth recalling the provisions of the 1982 LOSC concerning reefs.[178] Article 6 of the Convention

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[176] This has happened on the Subi Reef, Irving Reef, Cornwallis South Reef, Alison Reef, Erica Reef, Livock Reef, Boxall Reef, Mischief Reef, First Thomas Shoal, Bombay Shoal, Iroquois Reef, Royal Captain Shoal and Half Moon Shoal.

[177] Map drawn by Mapinfo.

[178] Although this had been discussed in the Expert Committee Meeting of the International Law Commission in 1953 and used in state practice, the use of reefs as base points was not included in the international law of the sea until the UNCLOS III. For legislation history of this stipulation, see Ian Kawaley, "Delimitation of Islands Fringed with Reefs: Article 6 of the 1982 Law of the Sea Convention" (1992) 41(1) *ICQL*, 152-160 at 153-156, P.B. Beazley, "Reefs and the 1982 Convention on the Law of the Sea" (1991) 6(4) *IJECL*, 281 at

provides a slightly different legal status for reefs in comparison with low tide elevations concerning the generation of baselines, that "[i]n the case of islands situated on atolls or of islands having fringing reefs, the baseline for measuring the breadth of the territorial sea is the seaward low water line of the reef, as shown by the appropriate symbol on charts official recognised by the coastal states". The Article did not provide any definition for the relevant terms such as reef, atoll and fringing reef. However, these terms were defined in research for the application of baselines in 1989 by the Office for Ocean Affairs and the Law of the Sea.[179] Accordingly, a reef is defined as a mass of rock or coral which either reaches close to the sea surface or is exposed at low tide. That part of a reef which is above water at low tide but submerged at high tide is a drying reef.[180] An atoll is a ring-shaped reef with or without an island situated on it surrounded by open sea that encloses or nearly encloses a lagoon.[181] A fringing reef is a coral reef that is directly attached to the shore or continental land mass, or located in their immediate vicinity.[182]

Article 6 is applicable to all type of reefs, not only to coral reefs.[183] Also, it clearly entitles islands on atolls and those with fringing reefs to expand their territorial sea by using surrounding reefs as basepoints.[184] Article 6 does not make clear whether it is only applicable to drying reefs or also to submerged reefs, as it only stipulates that the baseline for measuring the breadth of the territorial sea is the seaward low water line (not the low water line) of the reef. However, from the *travaux préparatoires* and opinions of many scholars, it is understood that Article 6 only applies to drying reefs or at least does not apply to permanently submerged reefs.[185] It is also noteworthy that Article 6 applies

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288-296 and P.B. Beazley, "Coral Reefs and the 1982 Convention on the Law of the Sea" in Gerald H. Blake (ed.), *World Boundaries,* (London: Roudledge, Vol.5., 1994), p.60 at 63-64.

[179] Office for Ocean Affairs and the Law of the Sea, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea,* (1989). This document, according to Churchill and Lowe, provides valuable analyses and is a source of modern international law of the sea as writing of highly qualified publicists. For further discussion, see Churchill and Lowe, *op.cit.,* note 122, p.5, 6, 13 and 27.

[180] *Ibid,* p.58.

[181] *Ibid,* p.49.

[182] *Ibid,* p.58.

[183] The previous draft of the International Law Commission only restricted on coral reefs by suggesting that "as regards coral reefs, the edge of the reef as marked on the above-mentioned charts, should be accepted as the low-water line for measuring the territorial sea". Quoted in Kawaley, *op.cit.,* note 178, p.156.

[184] However, Jayawardence believes that Article 6 seemingly applies to both island territories and islands which are appendages of continental states, for example, in the case of Australia with the Great Barrier Reef. For details, see Jayawardence, *The Regime of Islands in International Law,* (Dordrecht, Boston and London: Martinus Nijhoff Publisher, 1990), p.99.

[185] From *travaux préparatoires,* it was the intention of the drafting group to restrict the application of Article 6 to drying reefs, not submerged reefs. For details, see the proposal of Hodgson and Smith, "The Informal

irrespective of the distance requirement from the reef to the island as under Article 13(1) as well as the requirement of construction under Article 7(4). Therefore, in some circumstances, even if not qualifying as basepoints under Articles 13(1) and 7(4), drying reefs may still be used as base points under Article 6 if they pass the geographical requirement for atolls and fringing reefs. In this regard, Kawaley argued that Article 6 only applies to atolls and fringing reefs as mentioned in the text of the article, not to barrier reefs, which are walls of coral rock generally separated from the island or mainland by a deep channel or lagoon.[186] It is also not clear whether the restriction of using low tide elevations as basepoints in the cases of overlapping territorial seas as elaborated in *Qatar v. Bahrain case* is applied to the use of reefs as basepoints under Article 6.

As a result of the application of Article 6, closed lines are drawn to connect the islands with the fringing reefs creating a lagoon between the reefs and the island. The lagoon water within the closed lines is considered as internal waters in accordance with Article 8. This is another advantage of reefs in comparison with normal low tide elevations as the water area between an island and a normal low tide elevation which is used as basepoint is territorial water.[187] In addition to Article 6, Article 47(1) also stipulates that drying reefs may be used as basepoints for an archipelagic baseline.[188]

Applying these stipulations to the geographical situation of the Spratlys, which have coral structures, the North Danger Reef, Tizard Bank, and Union Reefs qualify under Article 6.[189] This means that in this case, these groups can use the line connecting all reefs and islands as baselines and the areas within the baselines are internal water. Such basepoints are the North Reef and South Reef in North Danger Reef; Petley Reef and Discovery Small Reef in Tizard Bank; and Johnson South Reef, Loveless Reef, Hughes Reef, Higgens Reef, Kennan Reef, Holiday Reef and Zhangxi Jiao in Union Reefs.[190]

Single Negotiating Text (Committee II): A Geographical Perspective", (1976) 3 *ODIL*, 225 at 230. For scholars' opinions see: Kawaley, *op.cit.*, note 178, p.157, Churchill and Lowe, *op.cit.*, note 122, p.52, Beazley (1991), *op.cit.*, note 178, p.303 and Jayawardence, *op.cit.*, note 184, p.96.

[186] Kawaley, *op.cit.*, note 178, p.156. However, according to a UN study in 1989, it is suggested that fringing reefs may include barrier reefs as well. For details, see Churchill and Lowe, *op.cit.*, note 122, p.52.

[187] This is implied from the stipulation of Article 13(2) that a low tide elevation which is wholly situated at a distance exceeding the breadth of the territorial sea from the mainland or an island has no territorial sea of its own.

[188] Article 47(1) says that "an archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago..."

[189] For a geographical description of the Spratlys' features, see Annex 1, *infra*.

[190] For the baselines and maritime zone of these groups, see *infra*, Figures 13, 14 and 16.

For the other reefs which are located outside the territorial sea breadth of islands, if they are still within an atoll or fringing reefs in terms of geography, they may be used as basepoints. According to the geographical situation of the South China Sea, no reef is found other than low tide elevations under the application of Article 13(1).[191]

4.2. Legal regime of artificial features

In addition to low tide elevations, the other features in the Spratlys do not have any impact on questions concerning territorial sovereignty and maritime delimitation. However, the practice of the parties to the South China Sea dispute, especially of China, suggest that some elevations, although submerged at high tide or even low tide, are still objects of occupation and claims for both territorial issues and maritime zones. The parties have fortified these claims by constructing structures such as lighthouses, military structures, and weather stations in order to make the elevations stand above water at high tide. This is the case of some elevations such as Macclesfield Bank, Alexandra Bank, Prince Consort Bank, Prince of Wales Bank, Rifleman Bank, Vanguard Bank, Mischief Reef, etc. With states' activities, these elevations lose their characteristic of being "naturally formed" and become artificial islands.[192] Not only have states built artificial island on submerged and low tide elevations, but the parties have also made constructions on some tiny islands in order to expand their areas. For example, the Swallow Reef, a very small reef in the Spratlys, has a long and narrow island, stretching from the north-east to the south-west in an area of only around 0.1 square kilometres. Due to the man-made activities by the Malaysian government, the 0.1 square kilometres island became an airstrip, diving resort and military installation for seventy soldiers in 1983. The pictures of the Swallow Reef before and after being occupied show significant differences:

[191] This search was based on the map of the Spratlys' features, *supra* in Chapter 1 and the geographical description of Hancox and Prescott, *op.cit.*, note 35 and Valencia *et al.*, *op.cit.*, note 16, Appendix 1, p.227.
[192] In an attempt to define an artificial island, Johnson specified that an artificial island must be an island in the same sense that a natural island is an island, i.e. must be surrounded by water and permanently above water at high tide. However, it differs from a natural island as the natural element. For further discussion on the history of the legal regime of artificial islands, see Johnson D.N.H. "Artificial island" (1951) 4 *ILQ*, 203.

Figure 11. The shape of the Swallow Reef before and after being occupied[193]

The legal regime of artificial islands depends on their status before improvement. Firstly, in combination with the legal regime of low tide elevations, artificial islands may be used as basepoints in straight baseline system only if they are built upon low tide elevations. To this extent, provided that coastal states are entitled to apply straight baseline method in accordance with the provisions of the law of the sea, the limitation in the legal regime of low tide elevations still applies, i.e. they will be excluded from use as basepoints in all disputed area. Secondly, dealing with the issue of artificial islands which are built on elevations submerged at low tide or built on low tide elevations located in continental shelf and EEZ, Article 11 of the 1982 LOSC stipulates that "[o]ff-shore installations and artificial islands shall not be considered as permanent harbour works." Articles 60(8) and 80 of the 1982 LOSC further clarify that "[a]rtificial islands, installations and structures do not possess the status of islands. They have no territorial sea of their own, and their presence does not affect the delimitation of the territorial sea, the exclusive economic zone or the continental shelf". The construction and installation of artificial islands within the maritime zones must be permitted because of the sovereign rights of the coastal state to natural resources in these maritime areas. Artificial islands in this case only result in an

[193] Sources: http://www.globalsecurity.org/military/world/war/spratly.htm (accessed on 17th March 2005). After construction, the Swallow Reef was changed not only dramatically in its area, but also differently in its angle and position.

entitlement to a safety zone of 500 metres.[194] Thirdly, with artificial islands which are built on tiny islands, the improvement will not change the status of those islands, i.e. the new improvement may not help the tiny islands to pass the test of Article 121(3) to generate all the maritime zones, except for the territorial sea to which they were entitled before changing from the "old coastline".

5. Maritime zones for the Spratlys

In the case of the Spratlys archipelago, the islands are of great number and located in groups, so it is necessary to examine whether any special regime can be applied all to the Spratlys.

5.1. The application of straight baselines

The 1982 LOSC gives rise to the new concept of archipelagic baselines in order to identify maritime zones of archipelago states. Archipelago in Article 46(b) of the 1982 LOSC is defined thus:

> ..."archipelago" means a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

In this case, as a result of the above analysis, the Spratlys consist of numerous islands; hence, it is possible to argue that the Spratlys are archipelagos and eligible for archipelagic baselines.[195] However, Article 47 of the 1982 LOSC also makes clear that the archipelagic baselines are only applied to an archipelagic state, i.e. "a state constituted wholly by one or more archipelagos and may include other islands".[196] In the case of the Spratlys, the sovereignty of the archipelago does not belong to any one state. In addition, all of the parties except the Philippines are mainland territories, so even if they are successful in claiming the entire archipelago, the Spratlys will not fall within the archipelagic regime. If the requirement of archipelagic state is ignored, with many tiny islands spreading in a large area of water, the ratio of water to land in the Spratlys will not

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[194] Articles 60(5) and 80 of the 1982 LOSC.
[195] In fact, China claims to apply straight baseline in both the Paracels and Spratlys in its Declaration on Territorial Sea in 1958.
[196] Article 46(a) of the 1982 LOSC.

meet the requirement of "between 1 to 1 and 9 to 1" and thus it is not eligible for archipelagic baselines.[197]

With regard to the Philippines, this country is an archipelagic state, but their claims are only lodged with part of the Spratlys, thus they are not entitled to apply any archipelagic regime for the entire Spratlys. The only possibility is that if the Philippines were successful with their claim, some features of the Spratlys could be used as basepoints for the Philippine archipelagic baselines. Article 47(1) provides that "[a]n archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago". The basepoints of archipelagic baselines may draw from the low tide elevation provided that "lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea form the nearest island".[198] However, the archipelagic baselines must meet the condition on ratio of water and land and the length of baselines under Article 47 of the 1982 LOSC. Accordingly, "[t]he length of such baselines shall not exceed 100 nautical miles, except that up to 3 per cent of the total number of baselines enclosing any archipelago may exceed that length, up to a maximum length of 125 nautical miles in the archipelagic baseline regime".[199] Due to the location of the Spratlys, the distance from the nearest islands of the Spratlys to the Philippines likely exceeds 125 nautical miles.[200] Hence, even if the Philippines success with their claims, they may be unable to use the Spratlys' features as basepoints to extend there archipelagic baselines. Given this analysis, there will be no special regime for the entire Spratlys. The generated maritime zones will depend on the legal regime of each island in the archipelago.

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[197] Article 47(1) provides the one of the conditions for the application of archipelagic baseline that "[a]n archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1".

[198] Article 47(4) of the 1982 LOSC.

[199] Article 47(2) of the 1982 LOSC.

[200] Such shortest distance is of about 130 nautical miles between the Commodore Reef and the western coast of the mainland of the Philippines. For illustration on map, see Figure 33, *infra,* Chapter 4. There are also possibilities of using some low tide elevations which is located in shorter distance as basepoints such as the Bombay Shoal, Royal Captain Shoal and Half Moon Shoal. However, these low tide elevations are located within overlapping maritime zones, and thus according to *Qatar v. Bahrain* case, they will not be used as basepoints.

5.2. Maritime generation and the application of Article 121

5.2.1. Maritimes spaces for islands which qualify under Article 121(3)

Of the 12 islands which pass the test of Article 121(3), the Loaita Island, West York Island, Amboyna Cay, Flat Island and Nanshan Island will generate the maritime zones individually while the others islands may expand their maritime zones by means of low tide elevations and reefs according to the provisions of Articles 13(1) and 6.[201] Some of these islands combine with low tide elevations and reefs to form group of islands, namely the North Danger Reefs, Tizard Bank, London Reefs. The features which may be used as basepoints in the baseline of each group are named as follows:

- Spratly Island and Ladd Reef in the London Reefs.
- Northeast Cay, Southeast Cay and two low tides elevations of North Reef and South Reef in the North Danger Reefs
- Itu Aba Island, Sand Cay, Nanyit Island, Eldad Reef, Gaven Reef, Discovery Great Reef and the low tide elevations of Petley Reed and Discovery Small Reef in the Tizard Reefs

The baseline and territorial sea of each group will be illustrated in the following figures:

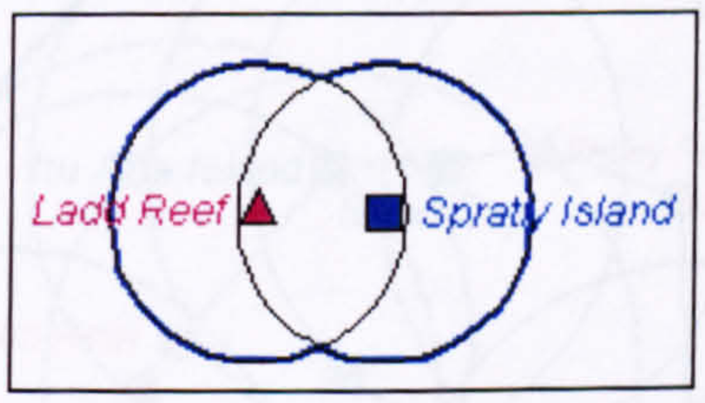

Figure 12. Territorial sea of the Spratly island taking account of the Ladd Reef[202]

[201] See *sufra* discussion, Section 4.1.
[202] Map drawn by Mapinfo. The blue line illustrates the territorial sea from the baselines of the group.

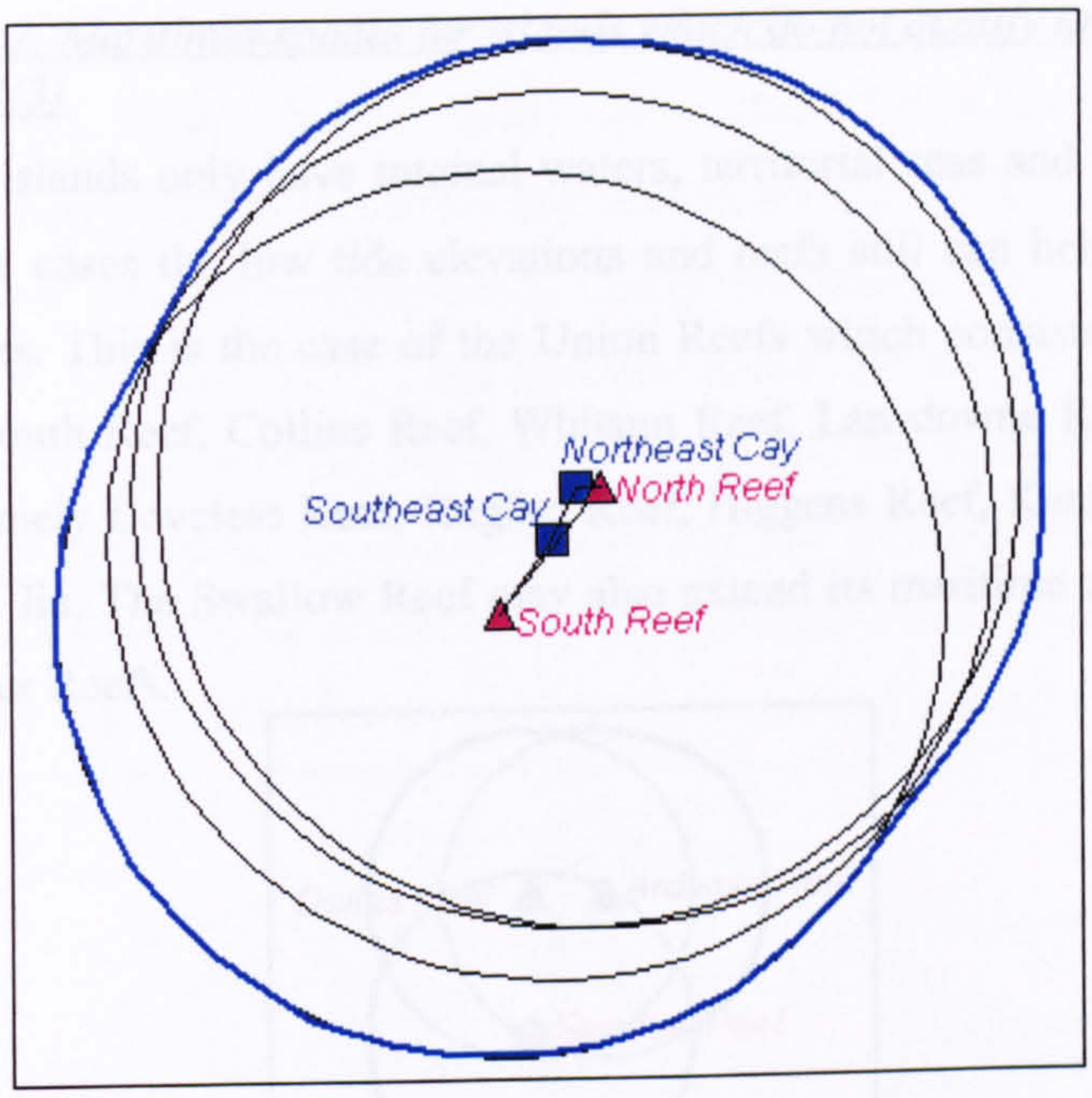

Figure 13. Baseline and territorial sea of the North Danger Reefs[203]

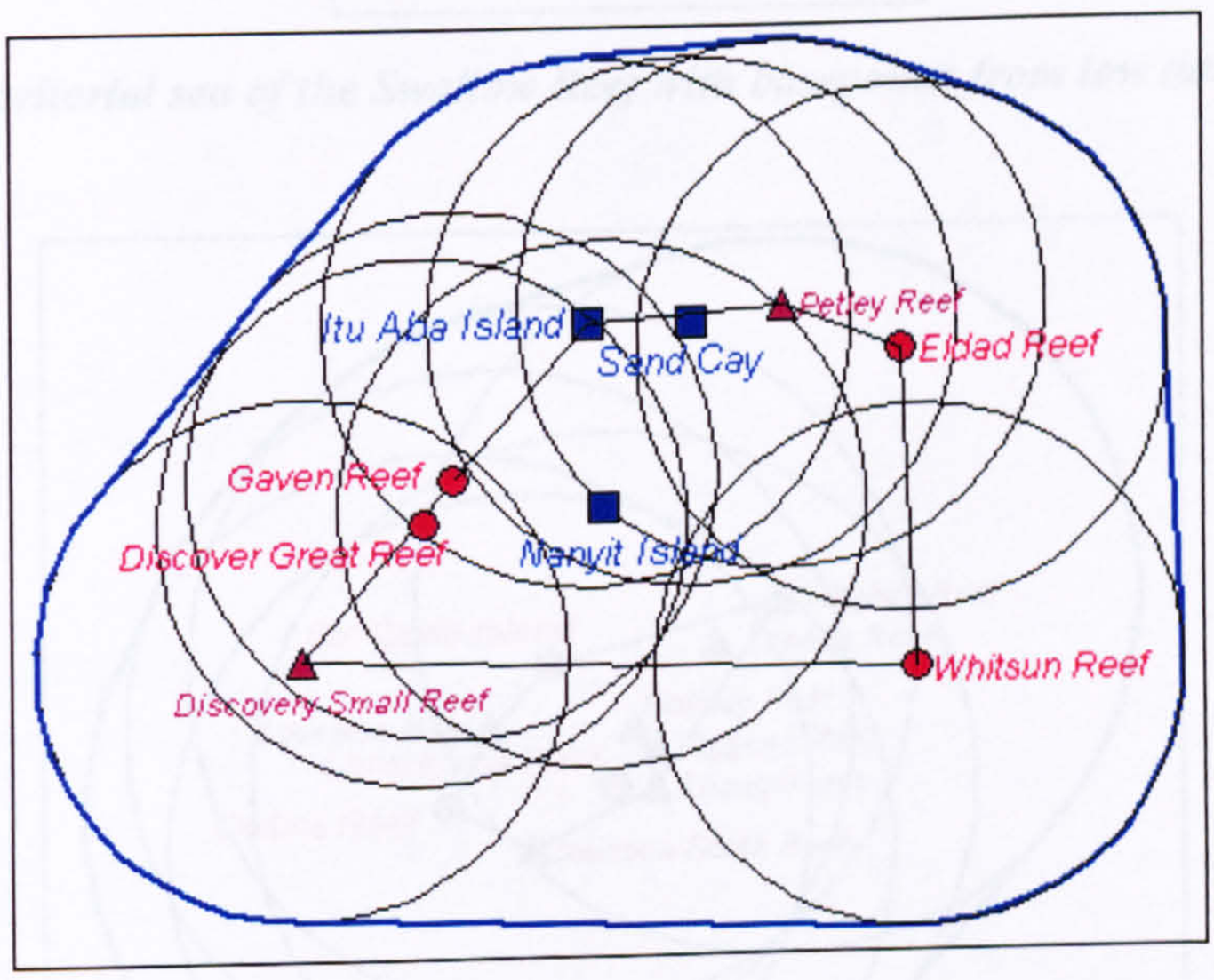

Figure 14. Baselines and Territorial sea of the Tizard Bank[204]

The baselines illustrated in the above maps will be used to generate EEZ and continental shelf for these groups.

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[203] *Ibid.*
[204] *Ibid.*

5.2.2. Maritimes spaces for islands which do not qualify under Article 121(3)

The other islands only have internal waters, territorial seas and contiguous zones. However, in some cases the low tide elevations and reefs still can help some islands to expand these zones. This is the case of the Union Reefs which consists of the Sin Cowe Island, Johnson South Reef, Collins Reef, Whitsun Reef, Lansdowne Reef and some low tide elevations namely Loveless Reef, Hughes Reef, Higgens Reef, Kennan Reef, Holiday Reef and Zhangxi Jia. The Swallow Reef may also extend its maritime zones by using the Dallas and Ardasier Reefs.

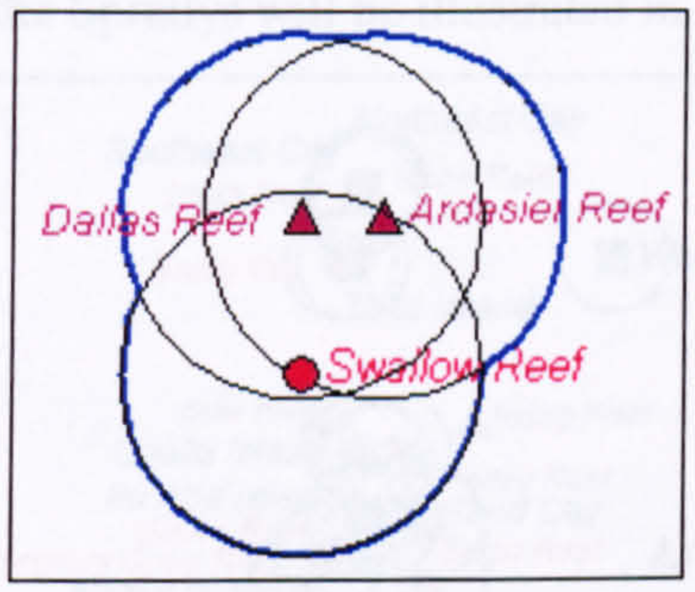

Figure 15. Territorial sea of the Swallow Reef with basepoints from low tide elevations[205]

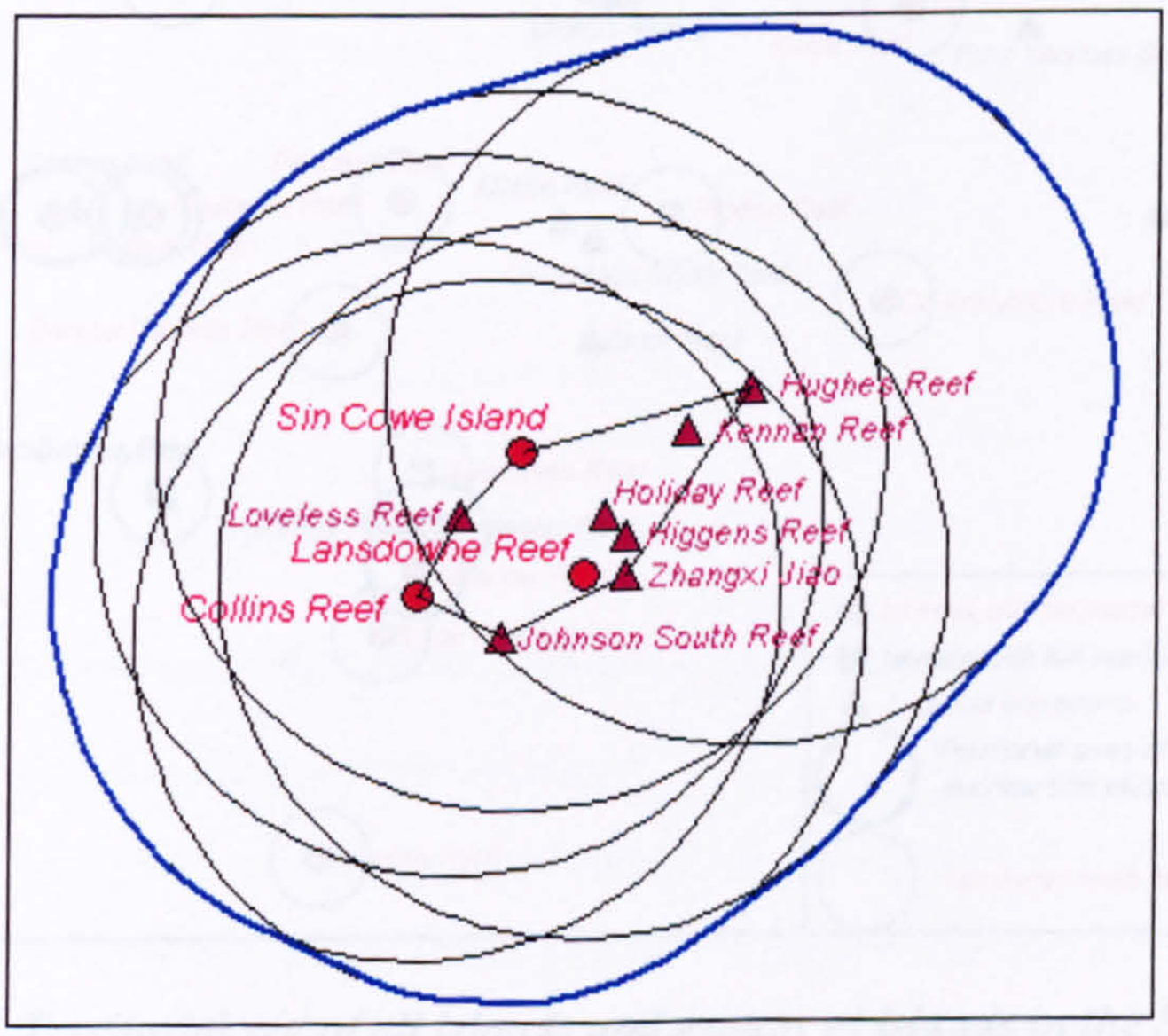

Figure 16. Baseline and Territorial sea of the Union Reefs[206]

[205] *Ibid.*

Other islands namely Fiery Cross Reef, Pearson Reef, Pigeon Reef, Barque Canada Reef, Mariveles Reef, Royal Charlotte Reef, Louisa Reef, Alicia Reef and Commodore Reef will have internal water, territorial sea and contiguous zones independently.

All other low tide elevations, namely Cornwallis South Reef, Alison Reef, Erica Reef, Livock Reef, Mischief Reef, First Thomas Shoal, Boxall Reef, Bombay Shoal, Iroquois Reef, Royal Captain Shoal and Half Moon Shoal, due to their distance from the surrounding islands exceeding 12 nautical miles and the geographical situation do not qualify as reefs, thus they will have no effect in generating maritime spaces in the Spratlys.

All maritime spaces of the Spratlys will be illustrated in Figures 17 and 18 as follows:

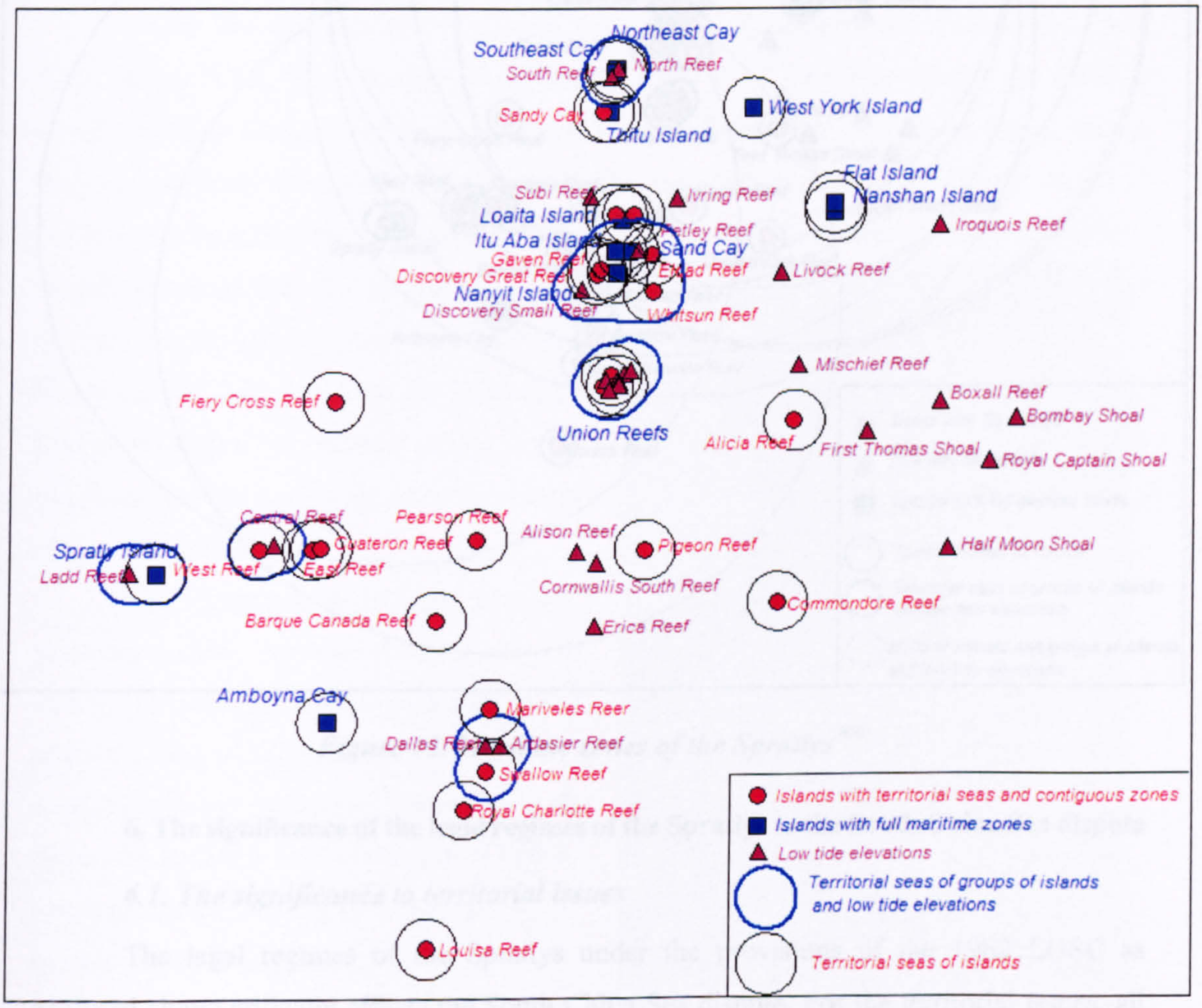

Figure 17. Territorial sea of all islands and groups of islands in the Spratlys[207]

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[206] *Ibid.*

[207] Map drawn by Mapinfo.

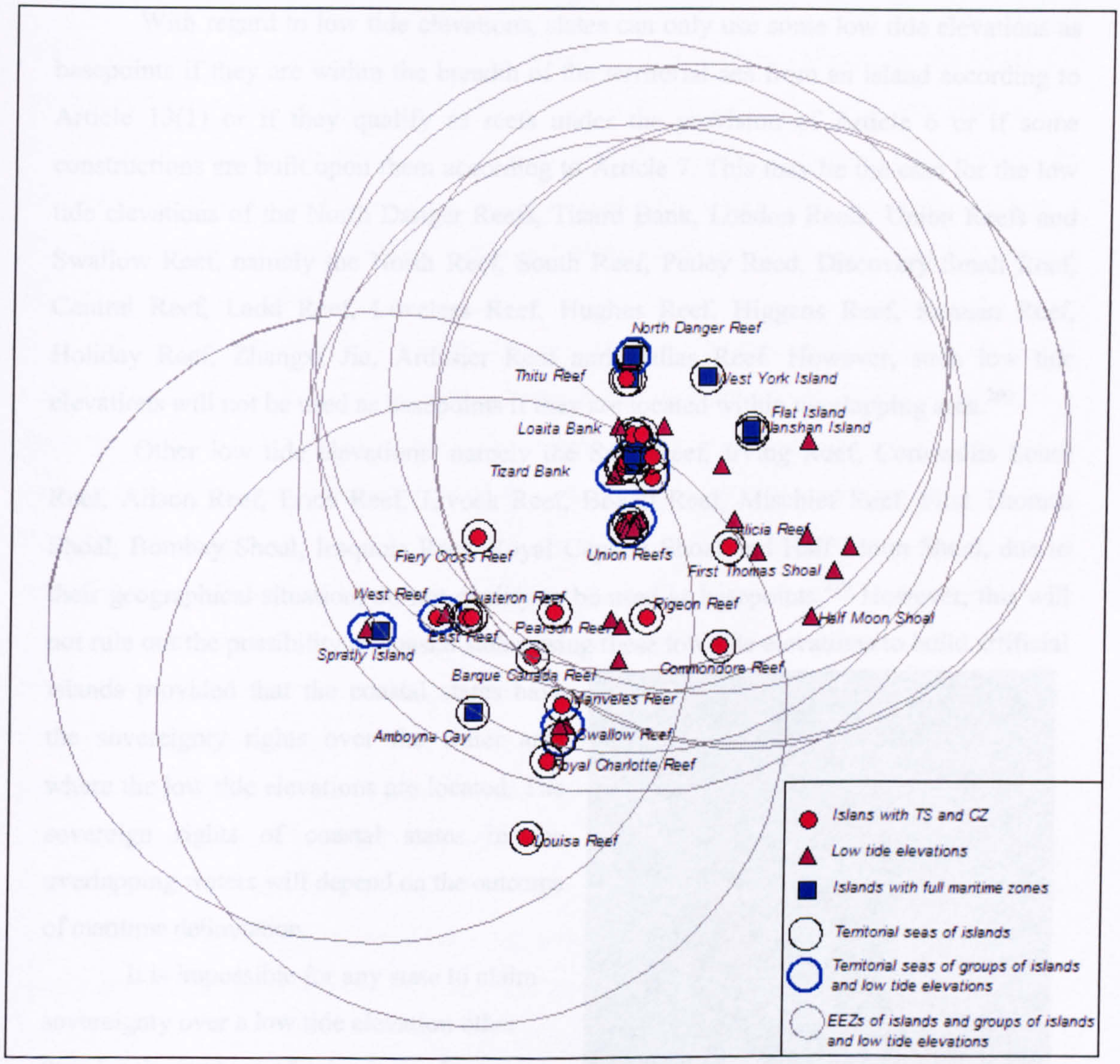

Figure 18. Maritime zones of the Spratlys[208]

6. The significance of the legal regimes of the Spratlys to the South China Sea dispute

6.1. The significance to territorial issues

The legal regimes of the Spratlys under the provisions of the 1982 LOSC as analysed above critically affects the South China Sea dispute. For the territorial issues, all of the claims of the parties in the dispute are only applied to the features which qualify as islands under Article 121(1).

[208] Map drawn by Mapinfo.

With regard to low tide elevations, states can only use some low tide elevations as basepoints if they are within the breadth of the territorial sea from an island according to Article 13(1) or if they qualify as reefs under the provision of Article 6 or if some constructions are built upon them according to Article 7. This may be the case for the low tide elevations of the North Danger Reefs, Tizard Bank, London Reefs, Union Reefs and Swallow Reef, namely the North Reef, South Reef, Petley Reed, Discovery Small Reef, Central Reef, Ladd Reef, Loveless Reef, Hughes Reef, Higgens Reef, Kennan Reef, Holiday Reef, Zhangxi Jia, Ardasier Reef and Dallas Reef. However, such low tide elevations will not be used as basepoints if they are located within overlapping area.[209]

Other low tide elevations, namely the Subi Reef, Irving Reef, Cornwallis South Reef, Alison Reef, Erica Reef, Livock Reef, Boxall Reef, Mischief Reef, First Thomas Shoal, Bombay Shoal, Iroquois Reef, Royal Captain Shoal and Half Moon Shoal, due to their geographical situation, do not qualify to be used as basepoints.[210] However, this will not rule out the possibility of coastal states using these low tide elevations to build artificial islands provided that the coastal states have the sovereignty rights over the water area where the low tide elevations are located. The sovereign rights of coastal states in the overlapping waters will depend on the outcome of maritime delimitation.

It is impossible for any state to claim sovereignty over a low tide elevation other than for the purpose of using it as a basepoint or for building an artificial island in the conditions mentioned above. For example, the claim of a state to a low tide elevation in the Spratlys in the following picture is not acceptable but is happening:

Figure 19. Sovereignty claim over an "island"[211]

[209] This restriction is in line with the judgment of the *Qatar v. Bahrain* case, see *supra,* this Chapter.
[210] However, state practice shows that the parties still claim low tide elevations for their own sake. This may be because of the possibility of using the low tide elevations as base point in order to generate maritime claims.
[211] Source: http://faculty.law.ubc.ca/scs/ (accessed on 7 December 2005).

6.2. The significance to maritime issues

The presence of the features of the Spratlys in the South China Sea will have an effect on maritime delimitation. With 12 islands in the Spratlys which may generate full maritime zones under Article 121(3), there may be no areas of high sea in the South China Sea.[212] This may entitle the successful claimants to exercise sovereign rights to all the natural resources in the South China Sea. However, due to the small size of the islands in the Spratlys, international navigation may not be affected as vessels still have the freedom of navigation in the EEZ.[213]

Also, the extension of maritime zones from 12 islands with entitlement to full maritime zones is likely to create large overlapping areas between the maritime zones of the Spratlys with those of littoral states. This means the successful claimants will have some advantage in maritime delimitation with the adjacent littoral states. However, due to their tiny size, these features may not have full effect in comparison with the mainland of the littoral states. This issue will be analysed in further detail in Chapter 4 of this thesis.

In addition to the possibility of overlapping maritime zones between the Spratlys and the littoral states, it is possible to have overlapping maritime zones among the features of the Spratlys themselves if they belong to different countries. There are three such possible overlappings. First, overlapping may result between the EEZ and continental shelf of the 12 islands which have full maritime zones under Article 121(3). Second, overlapping may occur between the EEZ of the 12 islands and the territorial sea and contiguous zones of other islands which are classified as rock under Article 121(3). Third, territorial seas and contiguous zones may overlap between the islands which are classified as rocks under Article 121(3).

The use of low tide elevations as basepoints may further expand the maritime zones for some islands up to a maximum of 12 nautical miles and thus may increase the overlapping zones. In addition, the states may also use some other low tide elevations within their EEZ to build artificial islands and these artificial islands will have 500 metre safety zones.

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[212] For illustration on map, see figure 28, *infra*.

[213] At the moment the main navigation route is along the coast and within the EEZ of Vietnam. This water area, even after any maritime delimitation will likely unchanged the legal regime as EEZ. Therefore, although they will be subjected to more restrictions than those in the high sea, the navigation rights of international vessels will almost unaffected.

7. Conclusion

The legal regime of islands is controversial in the international law of the sea due to the imprecise text of paragraph 3 of Article 121. It gives rise to a tension between the trend to extend sovereignty rights of coastal states and the protection of freedom of international navigation. It also causes many difficulties in maritime delimitation as a tiny island, once it is able to generate full maritime spaces, will create distortion. In the case of the Spratlys, all of these problems are present and the issue of the legal regime of islands will play a key role in resolving the sovereignty and maritime disputes among the claimants. Therefore, the sole way to overcome the vagueness and difficulty of Article 121 is to reasonably apply this article in the special situation of the Spratlys.

Article 121 (1) gives a decisive answer to the sovereignty issue by the test of natural formation and the need to be above water at high tide. Accordingly, 35 features in the Spratlys which qualify as islands will be eligible for territorial sovereign claims. Other features, except for the use of some low tide elevations as basepoints and for building up artificial islands under the conditions provided by the international law of the sea, will not be subjected to any territorial claim.

An application based on the *travaux préparatoires*, the text and the purpose of paragraph 3, in combination with the special facts of the Spratlys case may result in the generation of all maritime spaces for 12 islands, namely Northeast Cay, Southeast Cay, Thitu Island, Loaita Island, Flat Island, Nanshan Island, Itu Aba Island, Sand Cay, Nanyit Island, Spratly Island, West York Island and Amboyna Cay. All maritime spaces which are generated from these islands, on the one hand, may help the claimants expand significantly their sovereignty, but on the other will probably create many overlapping maritime areas. This no doubt will cause great difficulty in maritime delimitation in the South China Sea. Although it is likely eliminate the existence of the high sea in the South China Sea, international navigation will not be affected.

Based on the finding of this Chapter, sovereignty issues and the prospects for maritime delimitation will be examined in the next two chapters respectively.

CHAPTER 3. LEGAL PERSPECTIVES ON THE SOVEREIGNTY ISSUES RELATING TO THE SPRATLYS: AN HISTORICAL APPROACH

1. Introduction

1.1. The applicable law: International law concerning territory acquisition

With a long history and complicated claims from multiple parties, the sovereignty question in the South China Sea dispute raises a number of issues of international law concerning territory acquisition, namely the modes of territory acquisition, recognition, *estoppel* and state succession. A brief examination of international law concerning these issues will allow an overview of the application of the law and facilitate legal analysis of the sovereignty issues in dispute.

1.1.1. Modes of territory acquisition

Under international law concerning acquisition, a title to territory can be obtained through five modes, namely occupation, prescription, cession, conquest and accession.[214]

If a territory belongs to no one, it is *terra nullius* and open to acquisition through legal process of occupation.[215] This process begins with discovery which creates '*inchoate title*'. Then, in order to obtain a full title, the *inchoate title* must be followed by *effectivités*.

In a slightly different mode, prescription "is a portmanteau concept that comprehends both a possession of which the origin is unclear or disputed and an adverse possession which is in origin demonstrably unlawful".[216] If a state is successful in establishing a title but after that fails to maintain a reasonable level of state activity, i.e. abandonment, the state may loss the title.[217] Other states by making use of abandonment

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[214] These modes were described in many text books of international law such as Brownlie, *Principles of Public International Law,* (Oxford: Oxford University Press, 6th ed., 2003), Chapter 7, p.123; Malcolm Shaw, *International Law,* (Cambridge: Cambridge University Press, 5th ed., 2003), Chapter 9, p.409; Robert Jennings and Arthur Watts (ed.), Peter Malanczuk, *Akehurst's Modern Introduction to International Law* (London and New York: Routledge, 1997, 7th ed.), Chapter 10, p.147 and *Oppenheim's International Law,* (Harlow: Longman, 9th ed., Vol.1, 1992). In Oppenheim's International Law, the 6th mode is included, namely adjudication.

[215] This definition was clarified in the *case of Western Sahara,* Advisory Opinion, ICJ Report, 1975, p.12 at para.79.

[216] Jennings, *The Acquisition of Territory in International Law,* (Manchester: Manchester University Press, 1963), p.23.

[217] For further see, Brownlie, *op.cit.,* note 214, p.138.

may reverse the established title by a new occupation. Again, the occupation under prescription only leads to lawful title if it is supported by *effectivités*.

In the two modes of occupation and prescription, *effectivités* are of central importance for the purposes of both the acquisition and maintenance of title.[218] In order to clarify the requirements for *effectivités*, it is worth recalling the dictums of some judgments concerning territory acquisition. In the *Eastern Greenland* case, the Permanent Court of International Justice laid down two elements for effective occupation, namely "the intention and will to exercise... sovereign and the manifestation of state activity".[219] Intention can be inferred from official notifications and the display of sovereignty may be satisfied by concrete evidence of possession or control. *Effectivités* were also clarified by Arbitrator Huber in the *Island of Palmas* case as an actual and durable taking of possession within a reasonable time, i.e. the continuous and peaceful display of territorial sovereignty.[220] Furthermore, in the *Clipperton Island Arbitration*, the arbitrator held that effective occupation consists of a physical act or acts, the purpose of which is to exercise exclusive authority.[221] 'Authority' according to Oppenheim means the establishment of proper state machinery, the actual display of state jurisdiction.[222] However, in a special case of uninhabited places, the requirements for *effectivités* are less strict. In the *Minquiers and Ecrehos* case, Judge Basdevant in his separate opinion emphasised that exercising effective military control did not necessarily mean garrisoning practically uninhabited or uninhabitable places, but that, for this purpose, power to hold such areas at will and to prevent other states from occupying them was sufficient.[223] Also related to a special case of a very small island, in the *Qatar v. Bahrain* case, the Court held that certain activities such as the construction of navigational aids could be sufficient to support sovereignty claims.[224] In addition, acts of individuals by themselves are no substitution for the display of state

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[218] Georg Schwarzenberger, "Title to Territory: Response to a Challenge" 51 (1957) *AJIL* 308-324 at 315.
[219] *Eastern Greenland Case (Denmark v. Norway)* (1933) PCIJ Series A/B no 53 (hereafter referred to as the *Eastern Greenland* case), p.22 at 63.
[220] This requirement was illustrated in interpretation of terminology employed in the special agreement between the Netherlands and the United States in the award of the *Island of Palmas* case (1928) 2 RIAA, p.829, reprinted in (1928) 22 *AJIL* 867 at 874-877.
[221] *Clipperton Island Arbitration (France v. Mexico)* 2 RIAA 1105, (hereafter referred to as the *Clipperton Island Arbitration*), also in (1932) 26 *AJIL* 390 at 393.
[222] Oppenheim, *International Law,* (London: Longman, 1955, 8th ed., Vol.1), p.546.
[223] *Minquiers and Ecrehos Case (France v. UK)* ICJ Reports (1953), p.47 (hereafter referred to as the *Minquiers and Ecrehos* case); Individual opinion of Judge Basdevant, ICJ Report (1953), p.74 at 78.
[224] ICJ Report, 2001, p.40 at para.197.

authority. Unless authorised in advance or subsequently ratified, the activities of individuals can be neither attributed nor imputed to the state whose nationals they are.[225]

In addition to occupation and prescription, title can also be obtained by cession and conquest. In cession, the title is shifted by virtue of a treaty or cession.[226] This is the mode in which the owner willingly and voluntarily transfers the title, in contrast to the transferring through conquest in which the new title is established by the use of force. In the nineteenth century, it was inevitable that international law should allow states to acquire territory by conquest, because at that time customary international law imposed no limit on the rights of states to go on war.[227] In the early twentieth century, various efforts were made to prevent the use of force as a legal means under international law. Firstly, the second and the third Hague Conventions of 1907 limited the use of force to recover contract debt and require war to be preceded by formal declaration.[228] Then, with the unprecedented suffering of the First World War, the Covenant of the League of Nations required that war be used only as a last resort three months after the parties received a judicial settlement or report by the Council.[229] The Kellogg-Briand Pact of 1928 followed in which the use of war was outlawed as an instrument of national policy. This marked the first general acceptance of the prohibition of the use of force, which was then codified in Article 2(4) of the United Nations Charter. Nowadays, war is no longer a legitimate instrument of national policy and all of the UN member states must refrain from the threat or use of force against the territorial integrity or political independence of any state. The establishment of a title through the use of force or threat of force will not create a lawful title to territory. In addition, although force can be used in self defence under Article 51 of the UN Charter, it is still not acceptable for acquiring new territory.[230]

In exceptional cases, with the changes of nature, a new piece of land is formed resulting in new title, e.g. land may be added to the seashore, river deltas formed or the

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[225] Opinion of Judge Hsu Mo in the *Fisheries* case, ICJ Report, 1951, para.157.
[226] Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations,* (The Hague, London, Boston: Martinus Nijhoff Publishers, 1998), p.153.
[227] Peter Malanczuk, *op.cit.*, note 214, p.152.
[228] Hague Convention II (Laws of War: The Limitation of Employment of Force for Recovery of Contract Debts) and Hague Convention III (Laws of War: The Opening of Hostilities). For full text, see website of Brigham Young University Library at: http://net.lib.byu.edu/~rdh7/wwi/hague.html (accessed on 20 May 2006).
[229] Article 12(1) of the Covenant.
[230] For further discussion on the legal development of international law on the rights of conquest, see Sharon Korman, *The Rights of Conquest: The Acquisition of Territory by Force in International Law and Practice,* (Oxford: Clarendon Press, 1996), p.180-248.

bank of a river increased or diminished.[231] The generating of title in this special manner is called accession or accretion. However, this mode is not relevant in the case of the South China Sea dispute.[232]

1.1.2. Recognition and estoppel principle

With regard to the acquisition of territory, recognition and *estoppel* play a very important role. Recognition is an eminently suitable means for the purpose of establishing the validity of a territorial title in relation to other states. With recognition from other states, the control of one state may be considered as peaceful, thus satisfying one of the criteria for *effectivités*. Furthermore, "irrespective of any other criterion, recognition estops the State which has recognised the title from contesting its validity at any future time."[233] In the case of rival claimants, each party can make use of the recognition of the other to exclude the rival from the dispute through the application of the principle of *estoppel*.

Recognition may take the form of an express statement, or it may be inferred from acquiescence, i.e. failure to protest against the exercise of control by another. However, in every case recognition or acquiescence by one state has little or no effect unless it is accompanied by some measure of control over the territory by the other state; failure to protest against a purely verbal assertion of title unsupported by any degree of control does not constitute acquiescence.[234]

1.1.3. State succession

The South China Sea dispute has a long history during which some of the parties have experienced changes of sovereignty, developing from being colonies into new independent states. Thus, another issue related to the assertion of the parties' claims is state succession. International law concerning state succession provides that in the case of a new state which was formerly a dependent territory, i.e. a colony, or when a new state was

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[231] Georg Schwarzenberger, *op.cit.*, note 218, at 312.
[232] With global warming, the water level is reported to be increasing in the world. If this trend has some effect in the South China Sea dispute, it will not give rise to any new territorial acquisition in the South China Sea. As all of the features of the Spratlys are very small in size, the rise of water level may result in a reduction of number of features which qualify for sovereignty claims. For the legal analysis of criteria for features to be eligible for sovereignty claims, see *supra*, Chapter 2.
[233] Georg Schwarzenberger, *op.cit.*, note 218, p.316.
[234] Peter Malanczuk, *op.cit*, note 214, p.154.

formed by the merger of two or more existing states, treaties made by the predecessor states continue to apply to the territory to which they applied before the formation.[235]

However, under Articles 17 and 24 of the 1978 Vienna Convention on State Succession in Respect of Treaties,[236] a new state is under no obligation to succeed to a treaty if it does not want to do so; it can start life with a 'clean slate'. Articles 34 and 31 concerning disintegration and merger also permit a secessionary state to start life with a 'clean slate'. The clean slate is a doctrine which has been well established in customary law since the nineteenth century, although recent practice after 1945 cast some doubt on the clean slate doctrine as some independent states seemed to accept universal succession, i.e., they succeeded automatically to treaties made by their predecessor states.[237] However, it is submitted that small number of states following this way is not sufficient to uphold the clean slate doctrine. Furthermore, the practice was based on convenience, not based on consideration of legal obligation.[238]

1.2. Overview on the history of the dispute

The historical documents of the region record the long history of the use and exploitation of the South China Sea from 112 to 46 BC.[239] These activities were firstly by the Chinese and Annameses (the ancient name of the Vietnamese), then with the development of trade, other people, namely Persians, Arabs, Indians, Germans, and the Dutch also used the South China Sea as a convenient sea route for trading with Southeast

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[235] For general discussion on state succession with regard to treaties, see Malcolm Shaw, *op.cit.*, note 214, Chapter 9 and Peter Malanczuk, *op.cit*, note 214, p.165.

[236] For full text, see (1978) 17 *ILM* 1488. Notwithstanding the fact that the 1978 Vienna Convention on State Succession is not widely accepted and the entire Convention has not yet become international customary law (the Convention came into force in 1996 after the required 15th state party and in 2006, it has 18 state parties), the reference of international judicial bodies such as the ICJ, and the Arbitration Commission established under the auspices of the Peace Conference for the Former Yugoslavia show that the Convention is a guiding instrument concerning state succession which sets out the general position of international law to support the succession rights of states, particularly after decolonisation. For details of the reference of the ICJ, the Arbitration Commission and some state practice, see Andreas Zimmermann, "State Succession in Respect of Treaties" in Jan Klabbers *et al.* (ed.), *State Practice Regarding State Succession and Issues of Recognition*, (The Hague, London, Boston: Kluwer Law International, 1999), p.80-116.

[237] State practice concerning succession in Europe post 1989 showed that states were divided in application of the 'clean slate' principle. Russia, Czech, Slovak, and states from the former Yugoslavia accept the automatic succession from their former states. Accordingly, all treaties to which the former states had beforehand been a party will be succeeded automatically without any further declaration. On the other hand, some states of the former Soviet Union, except three Baltic States, follow the 'clean slate' principle. Among some European states, Austria expressed support for the 'clean slate' principle, whereas others support automatic succession. For further details, see Andreas Zimmermann, *ibid*, p.80-116.

[238] Peter Malanczuk, *op.cit*, note 214, p.165.

[239] From Chinese documents, cited in Samuels, *op.cit.*, note 5, p.10.

Asia and China. All these activities were conducted peacefully without any dispute concerning sovereignty.

It was not until the early twentieth century that with the presence of the colonial powers, a sovereignty claim in 1933 made by France, the protector of Vietnam, triggered the first dispute over the sovereignty of the islands in the South China Sea. France's claim was challenged by China and Japan. Japan used force to share the occupation of the islands with France in 1939. However, with the complicated situation during the Second World War, no arrangement was reached to solve the dispute.

The dispute was even more complicated when the Second World War ended, Japan renounced all right, title and claim to the Spratlys and Paracels. Vietnam, with its new independence from France, claimed sovereignty over these islands at the San Francisco conference and received no objection. China although being absent from the conference, in a separate declaration, also claimed sovereignty over the two archipelagos. However, the complicated situation of new independent states prevented both Vietnam and China from effectively occupying all islands in the two archipelagos. Cloma, a Philippines citizen, made use of the situation to claim the discovery of Kalayaan, a part of the Spratlys, and sought recognition from the Philippines' government. However, the Philippines did not make any claim at this time.

With the new development of the law of the sea, the role of mid-ocean islands is of significance in generating maritime zones for coastal states. Furthermore, the discovery of oil and other resources in the Paracels and Spratlys attracted the other states in the region to enter the dispute. The Philippines changed their attitude to support Cloma's discovery and made the first claim in 1971. Then, Malaysia and Brunei, based on the stipulation on continental shelf of the 1982 LOSC made their claim to some of the Spratlys islands in 1979 and 1987 respectively. The special situation of China also made Taiwan into a relatively independent party in the dispute and brought the number of parties to the South China Sea dispute to 6. The main historical events in the dispute will be summarised in the timeline in Figure 20 below.

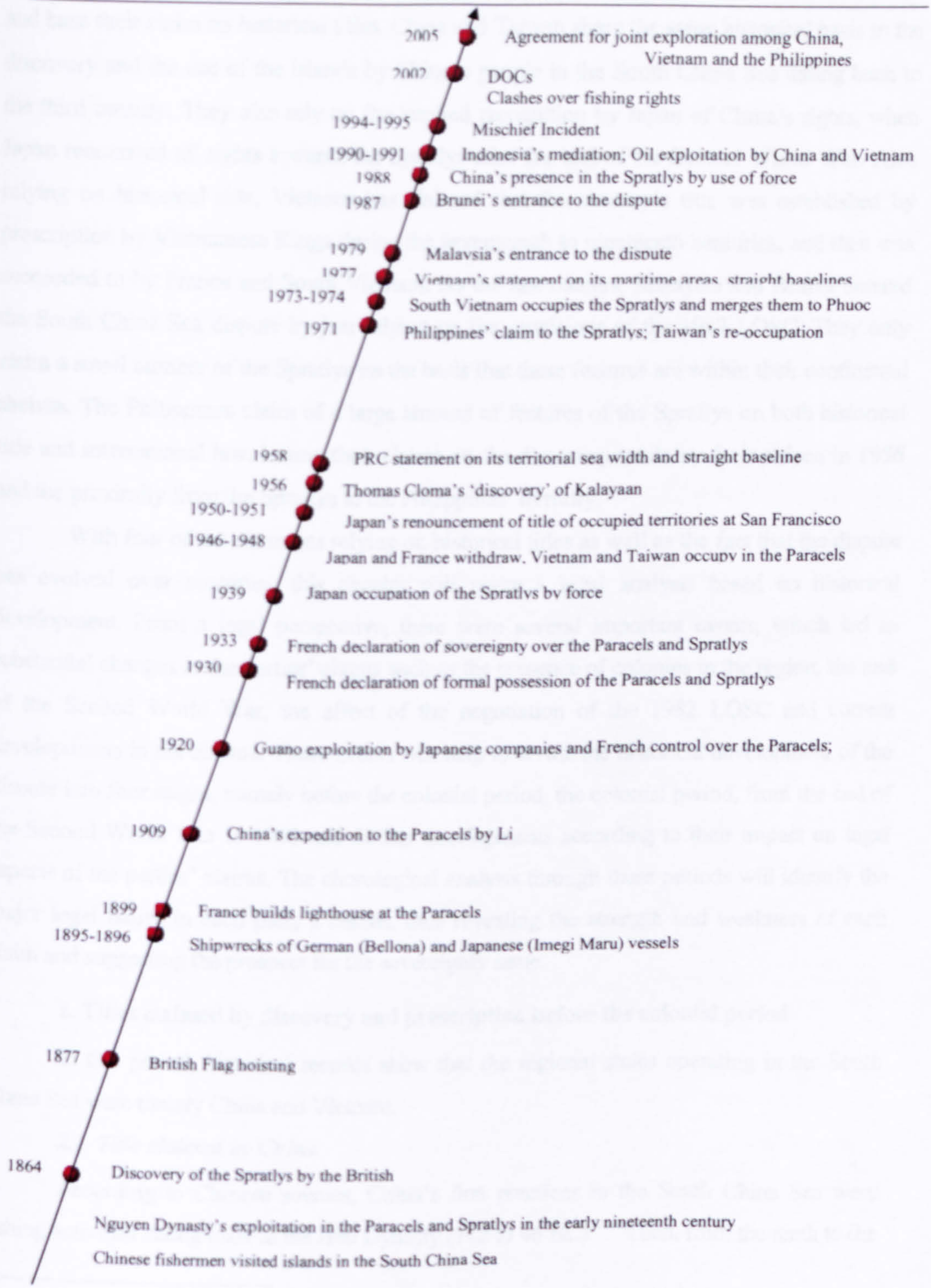

Figure 20. A timeline for the South China Sea dispute

Of the six parties to the dispute, China, Taiwan and Vietnam claim the entire Spratlys and base their claim on historical titles. China and Taiwan share the same historical basis in the discovery and the use of the islands by Chinese people in the South China Sea dating back to the third century. They also rely on the implied recognition by Japan of China's rights, when Japan renounced all rights towards the Spratlys after the end of the Second World War. Also relying on historical title, Vietnam has claimed that the country's title was established by prescription by Vietnamese Kings during the seventeenth to nineteenth centuries, and then was succeeded to by France and South Vietnam. As the late comers, Malaysia and Brunei entered the South China Sea dispute by just relying on the provisions of the 1982 LOSC. They only claim a small number of the Spratlys on the basis that these features are within their continental shelves. The Philippines claim of a large amount of features of the Spratlys on both historical title and international law, basing their claims on the discovery made by their citizen in 1956 and the proximity from the Spratlys to the Philippines' territory.

With four of the claimants relying on historical titles as well as the fact that the dispute has evolved over centuries, this chapter will make a legal analysis based on historical development. From a legal perspective, there were several important events, which led to substantial changes in the parties' claims such as the presence of colonies in the region, the end of the Second World War, the effect of the negotiation of the 1982 LOSC and current developments in the dispute. These events will help to divide the historical development of the dispute into four stages, namely before the colonial period, the colonial period, from the end of the Second World War to 1980 and further developments according to their impact on legal aspects of the parties' claims. The chorological analysis through these periods will identify the major legal issues in each party's claims, thus revealing the strength and weakness of each claim and suggesting the prospect for the sovereignty issue.

2. Titles claimed by discovery and prescription before the colonial period

In this period, historical records show that the regional states operating in the South China Sea were mainly China and Vietnam.

2.1. Title claimed by China

According to Chinese sources, China's first practices in the South China Sea were fishing activities dating back to the Han Dynasty (112 to 46 BC).[240] Then, from the tenth to the

[240] Wang Gung-wu, *The Nan-hai Trade*, p.1-45, cited in Samuels, *op.cit.*, note 5, p.10.

sixteenth century, as it emerged as a maritime power in the region, China used the South China Sea as the principal Chinese transit route for world trade.[241] China quoted a wealth of historical documents to illustrate their knowledge, discovery and occupation of the archipelagos in the South China Sea, in which the Chinese maritime presence was also known for collecting tortoises, exploiting guano and seeking shelter during sea storms.[242]

Along with the exploitation and development of the Paracels and Spratlys archipelagos by Chinese people, China claimed to have made some naval patrols to both the Paracels and Spratlys, namely a trip conducted by an admiral of the naval forces of the Guangdong province from 1710 to 1712 and in 1909. China also provided some maps dating from 1755, 1810 and 1817 from the Ch'ing Dynasty period, which illustrated both the Paracels and Spratlys as belonging to China.[243]

However, these arguments faced notable problems of authenticity and accuracy. In Chinese thinking at that time, similar to the Paracels, the Spratlys were very dangerous and remote areas:

> The [Changsha (Paracels) and Shitang (Spratlys)] area is vast and without a limit, and the sky and water meet with the same colour. Ships and boats sailing through the area are solely dependant on the compass to guide their navigation. Days and nights the compass has to be carefully observed, because even the slightest error may make a difference between life and death.[244]

Also, the Chinese historical records did not state clearly that the Spratlys were China's territory at that time. They were only described as places which appeared during voyages through the South China Sea.[245] The earliest document, *Nan-chou I –wu-chih (Record of Strange Things of the South)* written by Wan Chen in the period of Three Kingdoms (220-265) contained controversial information about "magnetic rock" and China believed that these

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[241] The route was called the Silk Route, which was the connection between China and the West. See Kuang-Min Sun, "Freeze the tropical seas: An Ice-cool Prescription for the Burning Spratly Issues" 20(3) (1996) *Marine Policy*, 199-208 at 200; also in Samuels, *op.cit.*, note 5, p.9-30.

[242] For further details, see Odgaard, *op.cit.*, note 16, p.63.

[243] Map from Samuels, *op.cit.*, note 5, p.39. For details of the Chinese claim, see Ministry of Foreign Affairs of the People's Republic of China, *China's Indisputable Sovereignty over Xisha and Nansha Island*, (Beijing: Foreign Languages Press, 1980).

[244] Zhao Rushi, Zhu Fan Zhi (Records of Various Barbarian Peoples), Volume B: Zhi Wu (Records of Things), under the entry of 'Hainan', translated in Jianming Shen, 1997, 29-30. Jianming mentioned that some Western and Chinese scholars consider the quote to be about the Paracels only. The confusion is likely to be due to the fact that at that time, knowledge of the South China Sea was so negligible that the people writing about the area did not distinguish between the Paracels and the Spratlys. Cf. Chemillier-Gendreau, 1996, *op.cit.*, note 35, p.58. Quoted and explained in Odgaard, *op.cit.*, note 16, p. 62 and 106. Chinese limited knowledge of geographical location is also analysed in Samuels, *op.cit.*, note 5, p.10-12.

[245] For further analysis of Chinese historical records, see Samuels, *op.cit.*, note 5, p.10-25.

documents referred to the Paracels in the third century.[246] Other historical books (in the same period as *"Record of Strange things of the South")*, such as *"Fu-nan Story"* written by Khang Thai, *Hsin T'ang Shu (New History of the T'ang Dynasty)*, *Ling-wai tai-ta (Information on What lies beyond the Passes)* and *Meng Liang Lu (Dreaming about the Capital)*,[247] also referred to some rocks or corals under different names in the South China Sea. Rocks and corals were numerous in both China's coastal area and the South China Sea region, but because different publications used different names, there was no evidence to show whether these historical books were describing the Paracels or not. This situation, however, had changed as in some documents like *Kuang Yu T'u (Enlarged Atlas of the World), Tao-I chih lueh (Record of Barbarian Isles)* and the *Ming Atlas*, the descriptions were sufficient to prove that China had known of the existence of the Paracels.[248] Despite the long historical records, none of the documents cited the Spratlys.

Two other historical books namely *Hai –kuo wen-chien lu (Sights and Sounds of the Maritime Countries)* and *Hai-lu (Oceanic Records)* were believed to contain the first historical record of China to mention the name of the Spratlys as Ch'ien-li shih-tang. However, the archipelago was mentioned only as a danger for maritime navigation. For example in Hai-kou wen-chien lu, the author said "South of the Sea of Ch'i-chou are the Ch'ien-li shih-t'ang. Here there is a forest of tens of thousands of rocks. Giant waves furiously swamp those ships that blunder into this area, and they are smashed to bits".[249] In addition, the author also noted that Wan-li ch'ang-sha "acts as the screen (outer protection) for Annam".[250] In other words, the Paracels in terms of geography were much nearer to Vietnam than China, and the book stated that the Paracels were a type of outer defence perimeter for Vietnam. Hence, it was inferred that being much further away, the Spratlys were not the subject of much attention from China at this time.

With regard to naval patrols, according to historical records, the direction of the journeys was around Hainan only.[251] There was not enough evidence to conclude that the Paracels were part of Hainan and included in the patrol of the admiral, let alone the Spratlys

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[246] Chemillier-Gendreau, *op.cit.*, note 35, p. 59.
[247] For relevant quotation of these historical materials, see Samuels, *op.cit.*, note 6, p.10-25, Chemillier-Gendreau, *op.cit.*, note 35, p.59 and Nguyễn Nhã, unpublished document, PhD Thesis in history, "Quá Trình Xác Lập Chủ Quyền của Việt Nam tại Quần đảo Hoàng Sa và Trường Sa", Hồ Chí Minh National University, 2002.
[248] *Ibid.*
[249] Samuels, *op.cit.*, note 5, p.38.
[250] *Ibid.* Wan-li ch'ang-sha is the name of the Paracels in historical document of China. Annam is the ancient name of Vietnam.
[251] For relevant quotation of the historical record, see *ibid.*

which were not mentioned with regard to patrols. Furthermore, maps provided in these historical documents drew both China and other neighbouring territories such as the Philippines, Vietnam, and Malaysia without noting which belonged to China. Meanwhile, other official maps describing Chinese territory under the Ch'ing Dynasty showed Hainan Island as the southern end of Chinese territory, not the Spratlys.[252] As in the *Island of Palmas* case, "official or semi-official maps... would be of special interest in cases where they do not assert the sovereignty of the country of which the Government has caused them to be issued".[253] In this case, the Paracels and Spratlys were excluded from Chinese territory; hence, these ancient maps of China might not support the claim of China over the Spratlys.

Therefore, the use of the historical records would not provide sufficient evidence to prove that China had an intention to claim the Spratlys in the seventeenth and eighteenth centuries.[254] The territory of China was so vast that the Chinese government might not pay much attention to such a remote and dangerous area as the Spratlys. This also matched with the historical situation of this period when China was no longer a maritime power in the region. Many other countries in the region and international maritime powers such as the Netherlands, Germany, France, and Britain left their footprints in the islands of South China Sea.[255] From historical documents, it can be concluded that China might have discovered the Paracels and Spratlys. However, international law clearly recognises that mere discovery of some territory is not sufficient to vest in the discoverer valid title of ownership to territory. Rather, discovery only creates *inchoate title*, which must be perfected by subsequent continuous and effective acts of occupation, generally construed to mean permanent settlement. Evidence of such effective acts was not compelled in China's claim to the Spratlys, thus at the end of the pre-colonial period, China's title to the Spratlys was not established.[256]

2.2. Title claimed by Vietnam

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[252] See Nguyễn Nhã, *op.cit.*, note 247, Annexes.
[253] *Island of Palmas Case* (1928) 2 RIAA, p.829, reprinted in (1928) 22 *AJIL* 867 at 891.
[254] This is also the conclusion of almost all scholars conducting research on the historical claim of China, namely Christopher C. Joyner, "The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geo-politics in the South China Sea" 13(2) (1998) *IJMCL* 193-236 at 199-200; Kuang Min Sun, "Dawn in the South China Sea? A Relocation of the Spratly Islands in an Everlasting Legal Storm" 16 (1990) *SAYIL* 32-60 at 40-42; Gerardo M.C. Valero, "Spratly Archipelago Dispute: Is the Question of Sovereignty Still Relevant?" (1994) 18(4) *Marine Policy*, 314-344 at 320-321; Mark Valencia *et al.*, *op.cit.*, note 16, p.23; Odgaard, *op.cit.*, note 16, p.92-93; etc.
[255] Some events related to the traveling of the French, Germans and British were listed in *infra* in this Chapter.
[256] Christopher C. Joyner, *op.cit.*, note 254, p.200.

The above mentioned conclusion was consistent with the historical information from Vietnamese sources[257] that Vietnamese practices, such as some 'exploitation activities' in both the Paracels and Spratlys in the South China Sea, were recorded since the fifteenth century under the reign of King Le Thanh Tong (1460-1497).[258] However, it was only from the seventeenth century that economic exploitation activities were conducted in the Paracels and Spratlys on behalf of Vietnamese kings. Based on these historical activities of the feudal government, Vietnam claimed that the country initially had historical title over the Paracels and Spratlys.

Similar to the historical documents of China, there was also some doubt about the precision and authenticity of the historical claim of Vietnam. However, from historical research, the documents of Vietnam were the official historical materials of the feudal Vietnamese government namely *Collection of Road-Maps of the Southern Country* (17th century), *Miscellaneous Records on the Government of the Frontiers* (18th century), *Chronicle of Dynasties*, published by Institute of National History, *Full Map of Dai Nam*, published by Ministry of Public Works, *Codes and Rules of Dai Nam Composed on Imperial Order, Full Geographical Map of Dai Nam*, and *Glimpse of the History of Vietnam* (19th century).[259] In these materials, the exploitation activities of Vietnam in the Paracels were described as well organised. The "Hoang Sa Company" which consisted of 70 seafarers from the coastal commune of An Vinh in central Vietnam was established by the Kings' orders to stay in the Paracels for six months every year to carry out the exploitation activities. Revenue collectors and a small local garrison were also set up to collect duty from all visitors and to ensure protection to Vietnamese fishermen. The Hoang Sa Company was also in charge of the Bac Hai Company, which conducted the activities of "harvesting valuable sea products and conducting salvaging operations to collect cargoes from vessels shipwrecked in the treacherous waters of Truong Sa [Spratlys]".[260] The Company was requested to measure and record navigation routes from the mainland to the Paracels and Spratlys to facilitate the exploitation

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[257] Although Vietnamese sources were much more limited than those of China, due to the wars that ravaged the country in the twentieth century, its practices were only recorded in some atlas written in the seventeenth century.

[258] Todd C. Kelly, "Vietnam Claims to the Truong Sa Archipelago [Ed. Spratlys Islands]" (1999) 3(3) *Exploitations in the Southeast Asian Studies*, online at http://www.hawaii.edu/cseas/pubs/explore/v3/todd.html (accessed on 24 November, 2004).

[259] The materials are available at the Social Sciences Library, Hanoi, Vietnam. This makes a sharp distinction about authenticity and precision with the materials of China written by ordinary people.

[260] Le Quy Don, Miscellaneous Records on the Government of the Frontier, Book 2, 1776, classical copy held at the Social Sciences Library, Hanoi, cited in the Hoang Sa and Truong Sa Archipelagoes (Paracels and Spratlys), (Hanoi: Vietnam Courier, 1985), p. 66 and 118.

activities. [261] Economic exploitation was continued in the early nineteenth century through the reign of the Nguyen Lords and their successors, the Tay Son. Nevertheless, the Paracels were not formally annexed to Vietnam until 1816. The Emperor Minh Mang (1820-41) built a pagoda in 1835 on Bana Rock as well as a stone monument to commemorate the event.

It was noteworthy that, in comparison with the many different names used in the historical documents of China, the names used in Vietnamese records and by some foreign authors at that time for the location and description of the Paracels and Spratlys are consistent with the current Vietnamese names for the Paracels and Spratlys.[262] In addition to Vietnamese sources, the exploitation activities of the Vietnamese kings were also confirmed in some foreign documents such as the record of Barrow John about a visit to Vietnam of an English diplomat in 1793,[263] the record of Jean Louis Taberd, a French bishop in the *Journal of the Asiatic of Bengal* in 1837[264] and an article by Dr. Gutzlaff in the *Journal of the Geographical Society of London* in 1849.[265] In a record of Jean Louis, he even described the Gia Long King of Vietnam paying a visit to the Paracels in 1816 and declaring his possession of the archipelago by an official ceremony and by hoisting the Vietnamese flag.[266]

The information from these historical documents showed that Vietnam had discovered and maintained its exploitation activities in the Paracels from the seventeenth to the nineteenth centuries. These activities received no opposition or counter requests from China and only stopped because of the entrance of France in the country in 1856. Regarding this point, Chen claimed that China did not know that Vietnam had encroached upon the Paracels and Spratlys.[267] However, if the argument was true, it only revealed that the occupation of China was not sufficient to protect its title from such exploitation over 6 months in a year and from a

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[261] For relevant quotations from the historical documents, see Nguyễn Nhã, *op.cit.*, note 247, p.329 and 339.
[262] For the quotation of Vietnamese historical sources and other sources of foreign authors, see the Hoang Sa and Truong Sa Archipelagoes (Paracels and Spratlys), (Hanoi: Vietnam Courier, 1985), p.117-125.
[263] Barrow John, *A Voyage to Cochinchina,* (T. Cadell and W Davies, 1806). Page 17 of the book contained the information that the Cochinchinese vessels "used in trade on the coast, in fishing, and to gather trepan and sea swallow's nests in the group of islands called Paracels, are of various constructions".
[264] Jean-Louis, "Notes on the Geography of Cochinchina" (1837) VI (Part II) *Journal of the Asiatic Society of Bengal,* 737-745.
[265] Dr Gutzlaff, "Geography of the Cochinchinese Empire" (1849) Vol. XIX, *Journal of the Geographical Society of London,* 93.
[266] Jean-Louis, *op.cit.*, note 264. This event was challenged by China as it was not recorded in Vietnamese historical documents. However, at the time when the Notes were written (1837), France did not have any intention as regards sovereignty of the Paracels and the position of the author as a bishop showed that there was no momentum for him to distort the information to support Vietnam.
[267] Kuang Min Sun, *op.cit.*, note 254, p.43.

new claim by Vietnam. More logically, in the seventeenth and the eighteenth centuries, China was no longer a sea power, thus the country could not control the two archipelagos.

The activities of Vietnam, which were conducted consistently by the Vietnamese government, might prove the intention of the government to assert sovereignty over the Paracels and Spratlys. The action of establishing the Hoang Sa Company, setting up a garrison to collect duty and measuring navigation routes further demonstrated the actual display of authority by the Vietnamese government in the Paracels and Spratlys. In addition, these practices, through a period of almost three centuries, did not provoke any protest from China or other countries, i.e. they were conducted 'continuously and peacefully'. According to the judgment of the Permanent Court in the *Eastern Greenland* case, with regard to inhabited territory, the consolidation of title through occupation required "very little in the way of the actual exercise of sovereignty rights".[268] Also, in some recent cases, *Indonesia v. Malaysia*[269] and *Qatar v. Bahrain*[270], the ICJ ruled that activities such as the construction and operation of lighthouses and navigational aids would qualify to establish sovereignty over a very small island. It might, therefore, be concluded that from the seventeenth to the nineteenth centuries, with its intention and continuous and peaceful management of the archipelago, Vietnam had been successfully establishing title to the Spratlys through prescription.

However, it might be argued that as the act of hoisting the flag only took place in the Paracels, the title for the Spratlys might just *inchoate title*. However, due to the fact that the Hoang Sa Company was in charge of exploitation activities not only in the Paracels but in the Spratlys through the Bac Hai Company, it might also be argued that Vietnam considered the Paracels and Spratlys as a united group of features in the South China Sea, thus the hoisting of the flag related to both archipelagos.

It was also noted that the official visit and hoisting of the flag of the King of Vietnam was very similar to the ceremonial declaration of sovereignty under contemporary international law on acquisition at that time. Unfortunately, it was not followed by an international declaration. Hence, one could argue that due to the lack of an international declaration, to some extent, the declaration did not have full effect. The other might argue that this was because the international law on acquisition, which originated in the West, was unfamiliar to the states in Asia and thus

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[268] *Eastern Greenland Case*, PCIJ, Series A/B no. 53 (1933), p.22 at 46.
[269] JCJ Reports (2002), p.625, at para.147.
[270] ICJ Reports (2001), p.40 at para.197.

could not be applied in this case. Therefore, under the intertemporal law principle,[271] such official activities might be considered as a declaration of sovereignty by Vietnam's Kings.

With regard to the historical title of Vietnam and China in this period, it would be necessary to mention the arguments of China that China has historically considered Vietnam as a vassal state and accordingly deemed all territories possessed by Vietnam or subject to Vietnamese jurisdiction as likewise subject to Chinese suzerainty.[272] This argument derived from the fact that the Kingdom of Annam was founded in the 11th century under the name of Dai Co Viet by the creation of a political power and administration independent of China but acknowledging Chinese suzerainty. Valero supports this argument and argues that the feudal relationship between China and Vietnam only came to an end with the conclusion of the Ly Frontier Agreement in May 1884, in which China agreed to respect all preceding and future agreements between France and Annam.[273] Hence, any Vietnamese claims to historic title over the Paracels and Spratlys before 1884 should be inured to China's benefit.

However, it should be noted that the vassal concept in the Chinese Confucian system is different from that of European feudalism. It is argued that the Viet Dynasty needed the blessing of China in order to gain recognition and survive. What it means is that the tribute of Vietnam to China concealed an extremely complex system of relations. For China, it indicated the maximum independence in which it could hope to maintain the Dai Viet without provoking any reaction against imperialism on its part. For the Dai Viet, on the contrary, it indicated the maximum independence to which the kingdom could aspire without provoking any imperialistic reaction on the part of China. In either case, bearing in mind the Confucian nature of the two countries, the tribute, in part at least, evinced common adherence to one system of values.[274] Thus, the vassal relations between Vietnam and China could not compare with the model of European, which was highly structured and well known by Western jurists as semi-sovereignty.

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[271] The operation of the principle of 'intertemporal law' was dealt with in the *Island of Palmas arbitration.* After conceding that a juridical fact must be appreciated in light of the law contemporary with it and not of the law in force at the time when a dispute in regard to it arises or falls to be settled, the sole arbitrator, Max Huber, made the following qualification:

> As regards the question which of different legal systems prevailing at successive periods is to be applied in a particular case (the so-called intertemporal law), a distinction must be made between the creation of rights and the existence of rights. The same principle which subjects the act creative of a right to the law in force at the time the right arises, demands that the existence of the right, in other words its continued manifestation, shall follow the conditions required by the evolution of the law (*Island of Palmas Case*, (1928) 2 RIAA, p.829 at 883, reprinted in (1928) 22 *AJIL* 867 at 883).

[272] Valero, *op.cit.*, note 254, p.323.

[273] Valero, *op.cit.*, note 254, p.324.

[274] Francois Joyaux, *La Chine et le Réglement du Premier Conflit d'Indochine,* (Genève: Publication de la Sorbonne, 1979), p.44-45; quoted in Chemillier-Gendreau, *op.cit.*, note 35, p.75-76.

In fact, the vassalage nominally accepted by Annam, in the form of honorary service, never allowed China to affect the foreign relations of ancient Vietnam. The history of Sino-Vietnam relations has seen many Chinese military ventures against Vietnam. When victorious, the kings of Vietnam never failed to seek to appease their gigantic neighbour by symbolically paying liege. In a similar situation in the *Minquiers and Ecrehos* case, when considering the effect of the vassal relationship between the Kingdom of France and the Duke of Normandy on generating title, the Court held that "such an alleged original feudal title of the Kings of France in respect of the Channel Islands could today produce no legal effect, unless it had been replaced by another title valid according to the law of the time of replacement. It was for the French Government to establish that it was so replaced".[275] If it was argued that China had a right over what was acquired by Vietnam, at the time the vassal relationship stopped, China did not make any reservation to this issue. Also, China itself did not acquire title to the two archipelagos at the time Vietnam became a protectorate of France. Therefore, the judgment of the *Minquiers and Ecrehos* case may be applied and means that China has no title over the Paracels and Spratlys.

Furthermore, the vagueness in the concept of vassal relationship to China can also be seen from the record of the Official Yearbook of the Chinese government, which claims that vassal states of China in the nineteenth century included Annam, Burma, Siems, Laos, Great Britain, the Netherlands, Italy, Portugal and the Holy See.[276] If it is argued that due to the vassal relationship, all the territory possessed by Vietnam should belong to China, the territory of all the counties under the above list also belong to China. Thus, the claimed vassal relationship between Vietnam and China has no legal effect in respect of generating title over the Paracels and Spratlys for China.

2.3. Practice of some other participants

Although China and Vietnam had known of and successively exploited the resources of the South China Sea, they did not make any international declaration. Thus, the effective control of the waters in this ocean was never fully monopolised. For a long time, before the presence of colonies in the region, Persians, Arabs, Indians, Chinese and the peoples of Southeast Asia, all used the freedom of the sea for trade and the islands of the contested archipelagos function either as points on the trading networks or as navigational markers. Also, in this period there was a

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[275] ICJ Report (1953), p.47 at 56.

[276] Jean-Pierre, "Le Conflit des Iles Paracels et le Problème de la Souveraineté sur les Iles Inhabitées" (1975) *Annuaire Francaiis de Droit International*, 173 at 180-181.

discovery by French seamen, who had travelled in an Eastern direction and arrived at the Paracels on March 7th, 1568.[277] In addition, the Paracels and Spratlys were well known in world maritime history due to the shipwreck of the Amphitrite under the reign of King Louis XIV in 1698, when this ship was on the way to China from France.[278]

2.4. The stronger claim of the pre-colonial period

The situation of this period confirmed the fact that the South China Sea had been known for a long time and according to historical records, the Chinese were probably the first to have known of the existence of the two archipelagos. However, prior to the presence of the colonial powers, all practices of littoral states were mainly carried out privately and focused on economic and maritime activities. None of the states made a declaration of sovereignty under international law on acquisition. Of the two dominant states practising in the South China Sea, the stronger claims belonged to Vietnam, as many official activities implied a declaration of sovereignty such as the King's official visit and the hoisting of the flag carried out by the government of Vietnam during the reign of the Nguyen Dynasty. Applying the intertemporal law principle, this may result in the first title from prescription for Vietnam. Meanwhile, according to historical records, the Chinese government had not yet expressed any intention to claim the Spratlys.

3. Titles established by colonial powers

3.1. The inchoate title of the United Kingdom

As they were interested in establishing trading stations and natural resource suppliers, the United Kingdom, France, the Netherlands and Spain entered the South China Sea region and divided the littoral territories of the South China Sea into their respective spheres of influence, namely Malaya, the northern Borneo colonies and Hong Kong, Indo-China, the Netherlands East Indies, and the Philippines respectively. In this period, almost all states accepted the principle of the "freedom of the seas" and applied the three mile limit which set territorial waters at the distance of a good cannon's range.[279] However, among them, Britain was the first European power to gain a footprint in the Spratlys. British seafarers reported the

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[277] Chemillier-Gendreau, *op.cit.*, note 35, p.42.

[278] Claudius Madrolle, *La Question de Hainan et des Paracels,* (Revue Politique Etrangere, 1939), quoted in *ibid.* The name Amphitrite of the ship was also the contemporary international name of one of the groups in the Paracels. However, no document was found to prove a connection.

[279] At the final meeting of its Territorial Waters Committee of the 1930 Hague Conference, there were 20 states, the majority of the participant, which sought territorial seas of three miles. For details, see Churchill and Lowe, *The Law of the Sea,* (Manchester University Press, 3rd ed., 1999), p.79.

discovery of the Spratlys in 1762, then, in 1821, the British Admiralty published charts for the South China Sea.[280] In 1864, the British Royal Navy ship, HMS Rifle, reportedly came across a few islands situated in the South China Sea and claimed them as part of the British empire. The name of the captain who carried out the discovery, Richard Spratlys, was used to name the islands. Therefore, the group of islands were called the Spratlys in English. Afterwards, in 1877, the governor of British North Borneo, currently the East Malaysian state of Sabah, authorised two men to go there and to raise the British flag.[281] These activities formed the *inchoate title* of Britain to the Spratlys. However, after that Britain did not pay much attention to the Spratlys and tended to support the claim of France.

3.2. Title by succession of France

France entered Vietnam in 1856 and later on became the protector of Vietnam under the Protectorate Treaty of 15 March 1874 and the Patenôtre Treaty of 6 June 1884.[282] France did not continue the exploitation of resources in the South China Sea by the Vietnamese kings in the nineteenth century until 1927, when France carried out patrol trips in the South China Sea to combat smuggling and conduct scientific surveys of the Paracels and Spratlys islands.[283] Then, in April 1930, during the second expedition to the Paracels and Spratlys by the ship La Malicieuse, France declared her formal possession of the Spratlys by hoisting a French flag on the highest point of an island called *"Ile de la Tempete"*.[284] Britain at that time did not lodge any protest at France's occupation. The islands were, in British thinking, deemed of little worth.[285] These initial interests were not developed into sovereignty claims until 1933. On 26 July 1933, France formally declared its sovereignty of the entire Paracels and Spratlys to the world and took physical possession of the archipelagos. It was noteworthy that the declaration clearly stated the

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[280] Hancox, David and Prescott, Victor., *op.cit.*, note 35, p.31-45, 50-54; Also in Odgaard, *op.cit.*, note 16, p.64.

[281] Catley and Keliat, *op.cit.*, note 30, p.6.

[282] The protectorate relationship was established by two treaties in 1874 and 1884, signed by the Nguyen Dynasty in Vietnam and France. In fact, Vietnam was colony of French and France devolved to all Vietnamese domestic and external affairs. For details, see Luu Văn Lợi, *Cuộc Tranh chấp Việt-Trung về Hai Quần Đảo Hoàng Sa và Trường Sa,* (Hà Nội: Nhà xuất bản Công an Nhân dân, 1995), p. 63-65, also in Odgaard, *op.cit.*, note 16, p. 64; and Todd C. Kelly, *op.cit.*, note 258.

[283] France previously intended to install a lighthouse in the Paracels in 1899 and carry out a scientific survey in this archipelago. This plan was not implemented due to the lack of finance. For detail see Chemillier-Gendreau, *op.cit.*, note 35, p.44; Also in Samuels, *op.cit.*, note 5, p.53. The 1927 survey was conducted by the crew of the SS De Lanessan. Cf. Todd C. Kelly, *op.cit.*, note 258.

[284] Chemillier-Gendreau, *op.cit.*, note 35, p.44.

[285] For an analysis of British thinking at that time, see Marston, Geoffrey, "Abandonment of Territorial Claims: The Cases of Bouvet and Spratlys Islands" (1986) *BYIL*, 337-356.

name of some features in the Spratlys, namely the Spratly Island, Amboyna Cay, Itu Aba Island, Sin Cowe Island, Loaita Reefs, Thitu Island, and Northeast and Southeast Cays as well as all adjacent reefs and shoals.[286] These features include 7 of the 12 islands which may generate full maritime zones.[287] The declaration was also followed by marking a stone pillar on which was written "République Francaise - Royaume d'Annam - Archipel des Paracels 1816 – Ile de Pattle – 1938".[288] Between 24 July and 23 September 1933, France completed the process of notifying all nations who might have had an interest in the Spratlys islands about its claim. With a sovereignty declaration clearly stating the intention of acquiring the Spratlys and a formal process to claim possession through hoisting the flag, marking a stone pillar and informing all other states, it can be submitted that France had established its title to the Spratlys.

Regarding the title of France to the Spratlys, it is noteworthy to analyse the relations of this title with two previous titles established by other states, namely the titles of the Annam's Kings in the pre-colonial period and of Britain in the nineteenth century.

Concerning the former title, there was an argument that the title established by France in 1933 succeeded to the title of the Annam's Kings as France came in Annam by virtue of protectorate treaty in 1856. However, one may raise concerns about the time of such a succession, which only occurred lately in 1933, about 70 years after France entered the region. The reason given for the delay of these sovereign claims was explained by France that France did not know about the title which Vietnam's Kings had established in the last three centuries. Therefore, France had to check whether the Paracels and Spratlys already belonged to any neighbouring countries, and particularly to China or the Philippines.[289] After having confirmed that the legitimate rights of Annam (Vietnam) resulted from the effective control of Annam's Kings since the seventeen century, France lodged its sovereignty declaration in 1933 through an international standard procedure including occupation, marking and declaration. In

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[286] This information was recorded in the Official Journal of the France Republic, 26 July 1933, p.7837.

[287] As the result achieved in Chapter 2, *supra*. Accordingly, 7 islands claimed by France which may generate full maritime zones are the Spratly Island, Amboyna Cay, Itu Aba Island, Loaita Reefs, Thitu Island, and Northeast and Southeast Cays.

[288] French Republic – Kingdom of Annam – Paracels Archipelago – Pattle Island – 1938. Quoted in Chemillier-Gendreau, *op.cit.*, note 35, p.46 ; Also in Lưu Văn Lợi, *op.cit.*, note 282, p.194 (with a picture of the stone pillar).

[289] The French consideration in this period could be seen through correspondence among its diplomats in China, officials in Vietnam and officials at the French Ministry of Foreign Affairs in France. For details, see Chemillier, *op.cit,* note 35, Annexes 13-17, p.196-214 and Annex 34, p.238.

memorandums sent to China to affirm French sovereignty over the Paracels and Spratlys, France argued that it inherited the islands from King Gia Long of Annam.[290]

With regard to the British title, the discovery of the Spratlys by Britain actually happened much earlier in 1762 but after that, only some limited activities were carried out to establish an *inchoate title* to the archipelago in 1877. It seemed that with their remote location and tiny size, the Spratlys archipelago did not receive much attention from Britain until France occupied the Paracels and Spratlys in 1930. After learning of the occupation of the islands by France, the Law Official of the Crown convened a meeting on 29 July 1932 to discuss this issue. The Official examined the activities of Britain and made a comparison with other cases to conclude that "[w]e are not able to infer from the event which took place in 1877-79 any acquisition of even an inchoate title to sovereignty, still less of a title perfected either by actual occupation or by some other open display of state authority".[291] Therefore, Britain decided not to dispute but to support France's claims. From 1933 to the end of the Second World War, Britain always expressed its support for France's sovereignty over the Paracels and Spratlys. Thus it may be concluded that Britain had abandoned its *inchoate* title to the Spratlys.

Taking into account the fact that the title established by Britain was only *inchoate* title and Britain had abandoned it, there was no fully established title to the Spratlys during the 70-year interruption between the two titles established by Annam's Kings and by France. Therefore, the title of France was still considered as continuance from the title of Annam's King, i.e. France may inherit the title to the Spratlys from Annam. Even if this succession was not recognised, the title established by France should be considered as a prescription because in accordance to contemporary international law, the previous *inchoate* title of Britain was abandoned and the claim of France to the Spratlys was the first well established through an international standard procedure including occupation, marking and declaration.

Another issue that should be raised concerning the title of France to Spratlys was whether France established such title for itself or on behalf of Annam as a protectorate. After successfully declaring sovereignty over the Paracels and Spratlys, France established administrative regions in the Paracels and Spratlys and attached these archipelagos to Thua Thien and Baria provinces respectively.[292] In the Spratlys, the names of the Spratly Island, the

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[290] For details see Chemillier, *op.cit,* note 35, Annex 47, p. 285.
[291] See Marston Geoffrey, *op.cit.*, note 285, 337-356.
[292] Thua Thien and Baria are two provinces in the South of Vietnam. For full text of the Decrees to place the Paracels and Spratlys to Thua Thien and Baria, see Nguyễn Nhã, *op.cit.*, note 247, p.356.

cay of Amboine, Itu- Aba, and the groups of Loaita and Thitu were listed as features to be attached to Baria province. This affirmed that France attached the Spratlys to Vietnam's territory. It should be noted that under Article 1(2) of the Patenôtre Treaty, "France represents Annam in all external relations".[293] Therefore, the attachment of the Spratlys to Vietnam's territory proved that the action of acquisition of the archipelago was conducted on behalf of Vietnam through the protectorate relationship.

3.3. Further practices of China

With regard to China's claim, in 1895 and 1896, there were two shipwrecks at the Paracels, the Bellona (German) and the Imegi Maru (Japanese). Local people from Hainan seized goods from the two ships and brought them to Hainan to sell. The British, for insurance purposes regarding the ships, made a claim to the Beijing authorities. However, the Chinese authorities refused to accept responsibility over the Paracels and stated that this archipelago was not part of Hainan.[294]

Facing the threat of the southwards policy of Japan, particularly its claim to sovereignty over the Pratas Island in 1907, several expeditions led by Admiral Li Chun of Guangtung Province were made to the Paracels from 1902 to 1909.[295] In contrast to other expeditions of the Chinese people in previous centuries, the trip conducted by Admiral Li Chun in 1909 was authorised by the Guangtung authorities with the purpose of acquiring the Paracels. This incident was followed by granting exploitation rights for Ho Jui Nien, a Chinese citizen, to exploit phosphate at the Paracels in 1921. These actions led to the declaration to merge the Paracels with Hainan Island and place them under the southern military authority of Guangtung.[296] However, no action was taken with regard to the Spratlys.

In response to the French declaration of 1933, in 1934 China raised a protest based on the interpretation of the Sino-French treaty of land border in 1887, in which there was an article concerning the division of the Tonkin Gulf. The Article says that "at Kouang Tong ... the islands situated to the east of the Parisian longitude at 105°43 eastern longitude, i.e., the north-

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[293] Chemillier, *op.cit,* note 35, p.86.
[294] Chemillier-Gendreau, *Ibid*, p.44.
[295] *Ibid;* also see Samuels, *op.cit.*, note 5, p.53. On these expeditions, it was reported that he was accompanied by a number of surveyors, engineers and scientists who participated in undertaking the formal reconnoitre of the islands and establishing sites for the construction of houses, roads, a radio station and phosphate processing plants.
[296] This authority was not recognised by central Chinese government and other states. At this time, the Republic of China was itself still in the process of formation. Cf. Chemillier-Gendreau, *op.cit.*, note 35, p.45; For further details of these activities, see Samuels, *op.cit.*, note 5, p.55-57.

south line passing through the eastern point of the Tch'a Kou Island or Ouan-chan (Tra-co) and forming the border, are attributed to China. The Gotho islands and the other islands to the west of this meridian belong to Annam." [297] Examining the Article in the context of a frontier convention, it might be concluded that the purpose of the article was to identify the end of the frontier. It did not aim to clarify a meridian line for the maritime area between the two countries, as the end of the north-south line mentioned in the article was not clarified, thus it was not clear whether the border would apply for the whole South China Sea or just apply for the Gulf of Tonkin. In addition, drawn to the South, the meridian line would intersect the Vietnamese mainland between Hue and Danang, cross the highlands near Kontum, Pleiku and Ban Me Thuot and eventually exit into the South China Sea just west of Phan Thiet. If it was argued that the meridian line should be applied to the whole South China Sea, China would have title to all islands including the Paracels and Spratlys archipelagos and some parts of the mainland of Vietnam. Therefore, it would be unreasonable for France at that time to conclude a Treaty with such an interpretation.[298] This meant that the 1887 frontier Convention could not be applied to enable China to claim the Paracels and Spratlys. In fact, the French tried to solve this issue by both diplomatic and judicial methods; however, due to the domestic situation of both China and France at that time, no solution was reached.[299]

With their protest against the sovereignty declaration of France over the Paracels and Spratlys, it seemed that China had an intention to claim the two archipelagos. However, except for the unpersuasive reasons based on the Sino-French treaty of land border in 1887, China did not conduct any other activities to establish their title to the Spratlys. Furthermore, in 1928, China published an official map showing that the southernmost delineation of Chinese territory as the Paracels and excluding the Spratlys.[300] Thus, it appeared that China had only formally protested against French action in the Paracels, not in the Spratlys. This leads to the conclusion that during the colonial period no claim to the Spratlys was made by China.

3.4. Titled claimed by occupation by Japan

[297] Hertslet's China Treaties, 1908, p.315, quoted in Choon-ho Park, *East Asia and the Law of the Sea,* (Seoul: Seoul National University Press, 1983), p.187, also quoted in Odgaard, *op.cit.*, note 16, p.88.
[298] The fact that the recent delimitation in the Gulf of Tonkin between Vietnam and China in 2000 also did not follow this article endorsed this interpretation.
[299] For a quotation of some diplomatic documents exchanged between China and France, see Chemillier-Gendreau, *op.cit.*, note 35, Appendixes.
[300] Lee G. Cordner, "The Spratly Islands Dispute and the Law of the Sea" (1994) 25(1) *ODIL* 61 at 63.

The emergence of Japan during the early twentieth century led to the expansion of Japanese territory toward the South and involvement in the South China Sea dispute from 1939 to 1945. Japan lodged a formal and explicit protest against the French sovereignty declaration of 1933 on the grounds that the archipelago had been mined for years by various Japanese phosphate companies.[301] The interest of Japan in the South China Sea region starting with the phosphate reserves began in the early twentieth century after this country occupied Taiwan in 1895 and the Pratas Island in 1907.[302] Ho Ji Nien who was granted the exploitation rights by the Guangtung Province authority to exploit phosphate in the Paracels was actually backed by Japanese phosphate companies based in Taiwan. Then, during the late 1920s and early 1930s, Japanese phosphate companies also began operating in the Spratlys.[303] However, these activities were limited only to economic interests, as Japan had not made any sovereignty claim until she protested against French claims and occupied the Paracels and Spratlys by force in 1939. During the Second World War, Japan maintained its occupation and placed the two archipelagos under the jurisdiction of the Governor General of Taiwan through the Kao-hsiung District.[304]

In response to Japan's activities, the French government sent a note to the Japanese Government to protest at the occupation and reaffirmed the sovereignty of France.[305] France also declared the division of the Paracels into two separate administrative regions and appointed personnel for some posts in both regions. These personnel were believed to have stayed there until March 1942 despite of the occupation of the Japanese.[306]

After the end of the Second World War, Japan renounced its rights to all of its occupied territories including those in the Paracels and Spratlys without any further reference to the fate of the two archipelagos.[307] The linkage between Taiwan and the two archipelagos under Japan's occupation led Taiwan to continue to occupy the Paracels and Spratlys.[308] With the 'one China' approach, Taiwanese claims would be claimed for China, thus to some extent, Japan's occupation in this period also fortifies Chinese claims. It is, therefore, necessary to clarify the legality of the occupation of Japan to identify whether any title over the Spratlys was established.

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[301] Caley and Keliat, *op.cit.*, note 30, p.25.
[302] Samuels, *op.cit.*, note 5, p.63.
[303] *Ibid.*
[304] *Ibid.*
[305] Chemillier-Gendreau, *op.cit.*, note 35, p.42.
[306] Samuels, *op.cit.*, note 5, p.65.
[307] Article 2(f). For details, see *infra* in this Chapter.
[308] Due to the victory of the Communist Party in China, the Republic of China fled to Taiwan in 1949, leaving both the Paracels and Spratlys unoccupied. Then POC replaced Taiwan's occupation in the Paracels but Taiwan still resumed its occupation in the Spratlys from 1956 until now.

First of all, as regards the legal nature of Japan's occupation from 1917-1919, it was *ab initio* not supported or acquiesced in by the Japanese government, but was private activity conducted by some merchants and companies involved in phosphate exploitation. This was confirmed by the protest of the Japanese government in 1933 on the basis of the economic rights of Japanese merchants. That meant that if the Japanese government did not have an intention to occupy the Spratlys in the first place, then its occupation between 1907 and 1933 would not constitute an 'effective occupation'. Even when Japan first showed its intention in 1933, this act put Japan at best on the same footing as France.[309]

Second, in competition with France, Japan occupied the Spratlys by force in 1939, 6 years after the occupation of France. 1939 was the time when the Kellogg-Briand Pact of 1928 and Article 10 of the Covenant of the League of Nations were in force to restrain the use of force in state policy.[310] Japan was one of the original members of the Kellogg-Briand Pact, but withdrew its membership in March 1933. However, it was argued that the Pact had independent effect, which never expired and was immune from denunciation.[311] Thus, the withdrawal of Japan from the Pact would not allow this country the use of force.[312] It could also be argued that with the severe consequences of the First World War, the prohibition of the use of force, developed from the Hague Conventions to the Kellogg-Briand Pact, was widely recognised in state practice as a legal obligation.[313] This could be seen as an initial process to form a new customary international law concerning the use of force.[314] The use of force by Japan was against the common recognition of states at that time, thus might not be considered as establishing any legal title.

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[309] Kuang Min Sun, *op.cit.*, note 254, p.43.

[310] For a comprehensive review on the effect of the article and the Pact, see Sharon Korman, *op.cit.*, note 230, p.180-199.

[311] Oppenheim, *International Law,* (London: Longman, 1955, 7th ed., Vol.2), p.193, quoted in Brownlie, *International Law and the Use of Force by States,* (Oxford: Clarendon Press, 1963), p.92 and Sharon Korman, *ibid,* p.193.

[312] In fact, when a conflict occurred between Japan and China in Shanghai in 1937, the Far Eastern Committee of the League rejected a Japanese plea of self- defence and stated that Japan had violated the Kellogg-Briand Pact. Similar views were expressed by the Assembly of the League and by the United States at the Brussels Conference on 18 January 1938. See *Peace and War*, p.390 (Declaration adopted by the Conference, 15 November 1937) and p.50, 389 (the US attitude), quoted in Brownlie, *ibid*, p.78.

[313] Particularly, the Kellogg-Briand Pact was referred to as an existing obligation and not as a temporary aspiration. For further discussion on state practice, see Brownlie, *ibid*, p.74-80.

[314] Stephen Neff argued that there were three important legal signs for the offing of the use of force. They were the financial arrangements of the Treaty of Versailles, the chief features of the League of Nations Covenant and the Pact of Paris of 1928. He also emphasised that the significance of the Pact was best summed as saying that it was intended to mark the definitive end of the *laissez-faire* approach to war that had culminated in the nineteenth century. Duel-wars were now to become a thing of the past. For further, see Stephen C. Neff, *War and the Law of Nations: A General History,* (Cambridge: Cambridge University Press, 2005), p.287-95.

Finally, the use of force should be examined in the context of the Second World War. In fact, the withdrawal of Japan from the Kellogg-Briand Pact in March 1933 was in preparation for the Second World War. The time that Japan used force to occupy the Paracels and Spratlys was in 1939, when it was conducting hostile activities and aggression against other countries in the region. Under the rules of the law of war,[315] Japan's wartime occupation of these archipelagos could not transfer any title to it, i.e. by illegal occupation in wartime, no title was established by Japan.[316]

Therefore, similar to Spain, in the *Island of Palmas* case, where the judges concluded that Spain "could not transfer more rights than she herself possessed",[317] Japan could not transfer any rights to Taiwan (China) over the Paracels or Spratlys after the end of the Second World War.

3.5. The stronger claim in the colonial period

The colonial period saw the claims of three superpowers in the region, namely the United Kingdom, France and Japan. Among them, the United Kingdom, after an early establishment of *inchoate title,* abandoned her title and supported the sovereignty declaration of France in 1930. Japan's claim, based on the economic rights of the country towards the guano resources in the Paracels and the Spratlys, was manifested in its protest to France's claims and by its occupation by force in parts of these archipelagos in 1939.

Of the two claims made by France and Japan, the stronger belonged to France as this country made the official sovereignty declaration to the archipelagos by succession. The claims of France were based on the practices of the Annam which later on was the colony of France. Although after the entrance of France in 1856, the title of Vietnam from the seventeenth to nineteenth century was not continued immediately, from 1856 to 1933 when France declared its sovereignty, no new title to the two archipelagos was established. Meanwhile, the claim of Japan was only based on the phosphate exploitation activities of Japan's phosphate companies between 1907 and 1933. These companies did not operate on behalf of the Japanese government. In addition, the use of force to occupy the two archipelagos in the course of the

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[315] Article 43 of the Hague Regulations which form the Annex to the 1907 Hague Convention IV respecting the laws and customs of war on land.
[316] The Kellogg-Briand Pact later still provided a legal basis for the charges of crimes against peace contemplated at the International Military Tribunal at Tokyo for Japanese activities during the Second World War.
[317] *Island of Palmas Arbitration*, (1928) 2 RIAA, p. 829, reprinted in (1928) 22 *AJIL* 867 at 879.

Second World War could not lead to a valid title. As Japan held no legal title in this period, any claim of inheriting title from Japan could not be accepted either.

4. The changes of titles from the end of the Second World War to 1980

With the end of the Second World War, colonial countries stopped their presence in the region. Claims to the Spratlys in this period were made by newly formed independent states. However, with the complicated political situation in both Vietnam and China, their claims were not consistent and their effective controls also were not continuous, thus creating some weak points in their legal arguments. In addition, during the early 1970s, the 1982 LOSC came to agreement on some major issues including the legal status of islands. This gave rise to the attention of states to islands as its role in generating maritime zones for the owned states. In the South China Sea case, with the location of the Spratlys in the middle of the ocean, the UNCLOS indirectly ignited another tension with the fortifying of the old claimants and the entrance of newcomers.

4.1. Title claimed by Vietnam

The successful revolution by Viet Minh in Hanoi led to the establishment of the independent Democratic Republic of Vietnam (DRV or North Vietnam) in 1945. Under the Franco-Vietnamese Preliminary Convention on 6 March 1946, "[t]he French Government recognises DRV as a free state having its own government, parliament, army and finances, and forming part of the Indochinese Federation and the French Union" and the fate of the South would be decided later through a referendum.[318] However, France did not follow the agreement in good faith. Under its encouragement, on 8 March 1949, a second Vietnam was created in the South which later became the Republic of Vietnam (ROV or South Vietnam).[319] From 1950, the two governments of Vietnam existed and were recognised by some countries as two independent governments.[320]

With regard to the title to the Paracels and Spratlys, in 1949 and 1950, the French government transferred the control in the Spratlys and Paracels to the South Vietnamese

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[318] Article 1 of the Convention. For full text see Gravel (ed.) *The Pentagon Papers,* (Boston: Beacon Press, 1971, Vol.1), Chapter 1, p.18-19, online at http://www.mtholyoke.edu/acad/intrel/pentagon/int2.htm (accessed on 24 November 2004).

[319] Chemillier-Gendreau, *op.cit.,* note 35, p.43.

[320] For details of the recognition, see Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Government in Exile,* (Oxford: Clarendon Press, 1998), p.98-9.

authority.[321] In 1950, as a participant and signatory to the Peace Treaty at the San Francisco Conference, the ROV's Prime Minister, Tran Van Huu, issued a statement at the Seventh Plenary Session which, in part, was as follows: "As we must frankly profit from all the opportunities offered to us to stifle the germs of discord, we affirm our right to the Spratlys and Paracels Islands, which have always belonged to Vietnam".[322] With these incidents, the South Vietnamese authority would be considered as the successor to France with regard to the title over the Paracels and Spratlys. Also, in this connection, the silence of the French delegation at the statement of Prime Minister Tran Van Huu, at the San Francisco Conference, also confirmed the intention of France to transfer title to the two archipelagos to the South Vietnamese government. In addition, the fact that the claim by South Vietnam at the conference passed uncontested could be argued as universal recognition of Vietnam's claims.[323]

The Foreign Affairs Minister of South Vietnam, Vu Van Man, reaffirmed the sovereignty of Vietnam over the archipelagos on 1 June 1956. Then, at the same time, the South Vietnamese authority sent a destroyer to patrol the Spratlys, to plant flags and to set up landmarks on the islands as symbols of occupation, but did not maintain a permanent presence in the region. On 22 October 1956, the Saigon government issued a declaration annexing the Spratly archipelago to its Phuoc Tuy province.[324] South Vietnam also realised its claim in the Spratlys by occupying 5 features in 1973. It also awarded eight oil exploration contracts to American and Canadian oil companies; some of these contracts overlapped with the western edges of the Spratlys. Taiwan, China and the Philippines opposed South Vietnam's activities.[325]

Despite many attempts by South Vietnam to consolidate their claim, North Vietnam did not make any claim over the Spratlys. In addition, in the letter of DRV Premier, Pham Van Dong, of 1958 and a Declaration by the DRV government on 9 May 1965, it expressed its support to the Declaration of China which declared the 12 miles of the territorial sea's width for Chinese maritime areas including those surrounding the Paracels and the Spratlys.

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[321] On 15 October 1950, France officially ceded its rights in the Paracels to Vietnam. Chemillier-Gendreau, *op.cit.*, note 35, p.43; Also, on 4 June 1949, French president enacted the Law Modifying the Status of Cochin China (former name of South Vietnam called by France) which was approved by the French National Assembly and Council, to acknowledge the unification of South Vietnam into Vietnam. This unification was argued to refer to the Spratlys as well because the Spratlys were attached to Baria province of South Vietnam and the 1949 law made no reservation on the fate of the Spraltys. For further, Cameron (ed.), *Vietnam Crisis : A Documentary History*, (Ithaca and London : Cornell University Press, Vol.I, 1971), p.128 and Valero, *op.cit.*, note 254, p.340.

[322] Quoted in Samuels, *op.cit.*, note 5, p.79.

[323] Cordner, *op.cit.*, note 300, p.63.

[324] Valero, *op.cit.*, note 254, p.342. China protested South Vietnam's actions but took no retaliation.

[325] Samuels, *op.cit.*, note 5, p.99.

In 1975, when the North and South of Vietnam were reunited, the united Vietnam continued the occupation and control of South Vietnam in the Spratlys. Then, Vietnam officially made claims over the Paracels and Spratlys by issuing a white book in 1979[326] and a Decree of Council of Ministers on 9 December 1982 on Vietnamese territory. In the meantime, Vietnam also expanded its occupation to 13 features in the Spratlys.[327]

The claim of the united Vietnam in 1975 was criticised of violating the principle of *estoppel* as during the period 1954 to 1974, North Vietnam expressed its support for China's sovereignty in the two archipelagos.[328] In order to have the answer to the *estoppel* issues, it would be necessary to examine the legal status of North Vietnam, South Vietnam and the united Vietnam after 1975.

The two Vietnams *de facto* existed by the establishment of the South Vietnam government since 1949. In 1954, after the military failure in Dien Bien Phu, France had to sign a Geneva Agreement on Vietnam in which she recognised DRV as an independent state and the military demarcation line at the 17th parallel was only a provisional boundary. The unification of Vietnam was to be decided by general election after two years.[329] However, after France withdrew from Vietnam, the South Vietnamese government which was supported by the United States not bound by the Geneva Agreement rejected the general election and fortified the South into a separate and independent state. In the 1960s, in the context of the Cold War, both the North and South Vietnamese governments were parties to various international treaties and received recognition from other states, particularly from those of the same ideology. The North and South Vietnam also participated in the World Health Organisation (WHO) and World Meterlogy Organisation (WMO) as full and separate members.[330] Thus, although the

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[326] Ministry of Foreign Affairs of Democratic of Vietnam, *White Book on Viet Nam's Sovereignty over the Hoang Sa and Truong Sa Archipelagos,* (Hanoi, 1979), also at UN Doc. A/34/541:S/13565, 19 October 1979.
[327] Odgaard, *op.cit.*, note 16, p. 70.
[328] The support of North Vietnam was argued through the 1958 and 1965 Declarations to express its government position on the Declaration on Territorial Sea of China.
[329] Article 14 of the 1954 Geneva Agreement on Vietnam. For full text see http://www.yale.edu/lawweb/avalon/intdip/indoch/inch001.htm (accessed on 20 December 2005).
[330] For ROV, by 1966, approximately 60 states recognised it as an independent state and more were to follow after the conclusion of the Paris Agreements in 1973. For DRV, besides the recognition of the socialist bloc, from from 1969, headed by Sweden, Western and non-aligned countries started to formally recognized DRV and to establish relations on an ambassadorial level, especially after the conclusion of the Paris Agreement in 1973. For details, see Stefan Talmon, *Recognition of Governments in International Law: With Particular Reference to Government in Exile,* (Oxford: Clarendon Press, 1998), p.98-9 and Konrad G. Bühler in *State Succession and Membership in International Organisation: Legal Theories versus Political Pragmatism* (The Hague, London and Boston: Kluwer Law International, 2001), p.72-6.

North and South governments of Vietnam did not recognise each other, under international law, they were two independent states.[331]

However, the pro-American policy and the revenge policy of the South Vietnamese government towards Communist people led to the establishment of the National Revolutionary Front of South Vietnam on 20 November 1960. The Front took the lead in a war in order to uphold the government of the Republic of Vietnam and stop the interference of the United States. With regard to the activities of this front, in June 1969, a Provisional Revolutionary Government (PRG) for South Vietnam was founded and became one party in the dialogue with the United States regarding restoring peace in Vietnam and was one of the parties involved in concluding the final peace agreement.[332] The PRG, by November, 1969, was recognised by 28 states. Others declared their intention, equivalent to recognition, to establish diplomatic relations with it (eg. Gabon, the UK, Canada) or established diplomatic relations by setting up information offices (e.g. Denmark, Finland, France, Norway and Sweden) or concluded bilateral agreements with that government, a fact which could be regarded as conclusive form the point of view of recognition (e.g.Algeria, Sweden).[333] The PRG also received the offer for loan from the International Monetary Fund (IMF) in 1975.[334]

With the military victory, the PRG took control of the territory of South Vietnam, renamed Saigon as Ho Chi Minh City, thus leading to the change of government in ROV. Then, on 25 April 1976 the North and South of Vietnam were merged by a general election and a National Assembly was elected including delegates from North and South. At the first meeting of the Assembly on 25 June 1976, the united Vietnam changed its name to the

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[331] This point is also supported by James Crawford in *The Creation of States in International Law* (Oxford: Clarendon Press, 2nd ed., 2006), p.472-7, Hanna Szego Bokor in *Questions of International Law* (The Hague, Martinus Nijhoff Publishers, 1986), p.24-8 and Konrad G. Bühler in *ibid*, p.72-80.

[332] The 1973 Paris Peace Accords on Ending War and Restoring Peace in Vietnam. For full text see website of Portland State University (quoted the text from the source of the US Department of state: Ending the Vietnam War documents), online at http://www.upa.pdx.edu/IMS/currentprojects/TAHv3/Content/Vietnam/Paris%20Peace%20Accord%201973.pdf. (accessed on 25 July 2007).

[333] Hanna Szego Bokor, *op.cit.*, note 331, p.28 and M. J. Peterson, *Recognition of Governments: Legal Doctrine and State Practice, 1815-1995* (London: Macmillan Press Ltd., 1997), p.118.

[334] The request for hard currency loan of about $20 million against Vietnam's 'gold tranche' and a cash for its $20 million of Special Drawing Rights was made by the South Vietnam government in April 1975. Although this government was taken over by the Provisional Revolutionary Government, in early May 1975 the spokesman of the IMF said the IMF was still ready to honour the requests if the newly-victorious government desired. This information was covered by *Washington Post*, 6 May 1975, p.A11, referred by Peterson, *op.cit.*, note 333, p.136.

Republic Socialist of Vietnam with the capital in Hanoi.[335] It also issued a new constitution in 1980 which provided a new state structure for the united Vietnam government.[336] The united Vietnam also attained a seat as a new state in the United Nations on 20 September 1977.

From the fact that both North and South Vietnam (either under the Saigon administration or the PRG) *de facto* existed with wide recognition before 1976 as two independent states and a united Vietnam was formed by the two by a general election, had a new national assembly with the equal representative from the North and the South, had a new constitution and constituted a new government structure, the formation of a united Vietnam is the merger of the two Vietnams.

As a newly created state, the united Vietnam could succeed from both the North and the South Vietnams. More exactly, in this period, there were two successions. The first was the succession of the PRG to the Saigon government in 1975 after the collapse of the latter and the second was the succession of the united Vietnam to both the North and the South Vietnam governments in 1976. One should raise a question of what principle applied to this succession as this issue was considered as complicated in theory due to the complex history of the unification.[337] However, from the fact that the united Vietnam, unlike the case of the formation such as German, Tanzania, etc., did not declare that all international treaties and agreement concluded by North and South Vietnam would remain in force, it could be inferred that the united Vietnam did not succeed automatically to treaties made by the two predecessor Vietnams. Instead, what the united Vietnam did in practice in the following years after the merger proved that it applied the principle of clean slate. Indeed, it chose to success some treaties and declared to be bound by some others which concluded by both the North and South Vietnam prior to July 1976.

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[335] These information is reported in widely publication, including James Crawford, *op.cit.*, note 331, p.476-7 and V.L.Luu, *Năm Mươi Năm Ngoại Giao Việt Nam,* (Hà Nội: Nhà Xuất Bản Công an Nhân dân, Tập 1, 1996), p.323.

[336] The old government structure headed by a premier with individual responsibility to a new one headed by a chairman of ministerial council with collective liability. Significant changes also happened in legislature bodies.

[337] One may raise the question of the similarity between this unification with the case of Germany. However, the two Germanies were united by a Unification Treaty which Article 23 provided that the German Democratic Republic (GDR) was to accede to the Federal Republic of Germany (FRG). The Unification Treaty also details various points concerning succession in which Article 11 confirming the continuance of the treaties to which the old FRG was a party, and Article 12 providing for consultations with treaty partners to decide upon the treaties to which the former GDR was a party. For further discussion on succession of Germany see James Crawford, *op.cit.*, note 331, p.523-25 and Jan Klabbers *et al.*, *op.cit.*, note 236, p.20

With regard to the treaties and constituent instruments of international organisations concluded by North Vietnam, as the treaties concluded by North Vietnam prior to 1976 were mainly with socialist countries and limited in numbers, practice of the united Vietnam concerning succession to these treaties was a few. For exapmple, the united Vietnam choose to inherit the majority of these treaties, except the letter of DRV Premier, Pham Van Dong, of 1958 and a Declaration by the DRV government on 9 May 1965 concerning the 1958 Declaration on the Territorial Sea of China and its membership in the WHO and WMO.[338] Regarding the treaties concluded by the South Vietnam, as South Vietnam was members of various treaties and international organisations, the practice of the unified Vietnam concerning these treaties was more diversified. For example, the united Vietnam succeeded $145 million in economic debts owned by the former ROV (this loan were made by the United States on concessional terms form 1960-1975 to support the development of economic infrastructure and to finance the importation of agricultural and other commodities), the Convention on the Prevention and Punishment of the Crime of Genocide (which accessed by the ROV on 11 August 1950) and the memberships of South Vietnam, including their constituent instruments, of the Food and Agricure Organisation, International Atomic Energy Agency, IMF, Asian Development Bank (including the responsibilities as borrower with respect to all loans extended by the Bank for the benefit of South Vietnam prior to 2 July 1976), International Telecommunication Union, Universal Postal Union and World Intellectual Property Organisation. Meanwhile, it declared not be bound by the 1963 Treaty Banning Nuclear Weapon Tests in the Atmosphere, in Outer Space and Under Water, the 1968 Non-Proliferation Treaty, the 1972 Safeguards Agreement, and the memberships of International Civil Aviation Organisation, the World Tourism Organisation, the Asian Rice Trade Fund and the Association of Natural Rubber Producing Countries.[339]

As a result of the application of the principle clean slate to its succession, the united Vietnam could succeed to the claim over the Spratlys of the South Vietnamese government. In fact, the South Vietnamese government maintained its occupation and control over the Spratlys

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[338] Concerning the letter of DRV Premier of 1958 and a Declaration by the DRV government on 9 May 1965, the united Vietnam issued a white book in 1979 in order to make officially made claims over the Paracels and Spratlys on the basis of continuing the claim of South Vietnam and refusing the position of North Vietnam. Regarding the membership in the WHO and WMO which both North and South Vietnam were member prior to 1976, the united Vietnam chose to inherit the membership of the South and terminated the membership of the North, thereby the united Vietnam was listed as a member of these organisation from the date that ROV became a member. For details of the succession of the united Vietnam in WHO and WMO, see Konrad G. Bühler, *op.cit.*, note 330, p.83-5

[339] For further discussion on these successsions, see Konrad G. Bühler, *op.cit.*, note 330, p.85-93

until the military forces of the PRG were replaced in 1975. In deed, North Vietnam did support the 1958 Declaration on the Territorial Sea of China in 1958 and 1965. These declarations of China stipulated that the straight baseline method would likewise apply to the Paracels, Macclesfield Bank, the Spratlys and all other islands belonging to China. The DRV Premier did not make any reservation to this stipulation when he stated the support of DRV; therefore, he indirectly and implicitly recognised China's sovereignty in the Paracels and Spratlys. However, as a successor of North and South Vietnam, the united Vietnam which began its status with a clean slate, it could choose which obligations and rights to inherit from North and South Vietnam. As a result, Vietnam would only have been bound by the position adopted by the now defunct North Vietnam if it opted to be so. As has been made clear, it renounced that position and so is not bound.

There might be another argument about the stability of boundary treaties that prevented the changing position of the united Vietnam concerning the claim over the Spratlys. Under Article 11 of the 1978 Vienna Convention on Succession of States in Respect of Treaties, "a succession of states does not as such effect (a) a boundary established by a treaty; or (b) obligations and rights established by a treaty and relating to the regime of a boundary." In the case concerning the claim over the Spratlys, North Vietnam and China did not conclude any treaty concerning their boundary regarding the Spratlys. There were only unilateral declarations concerning drawing baselines of China and the declarations of Vietnam expressing its position on the Chinese baselines. It is arguable that unilateral declaration is an exception of treaty on boundaries and cannot have the same effect as treaty on boundaries as a declaration from a state concerning boundary may receive oppose from others while a treaty does not. In this case, it is submited that unileral declarations cannot be assimilated with treaties establishing a boundary stipulated under Article 11 of the 1978 Vienna Convention. Furthermore, the unification of the two Vietnams was actually a long process of gaining independence from France and the United States. Article 16 of 1978 Vienna Convention is applicable in this case when providing that "[a] newly independent state is not bound to maintain in force, or to become a party to, any treaty by reason not only of fact that at the date of succession of states the treay was in force in respect of the territory to which the succession of states relates." This is to say Article 16 affirmes the possibility of clean slate principle to any treaties in the case of succession of newly independent state. Therefore, given that this is a situation of succession of a new unified Vietnam, the question

of *estopple* does not arise. In other words, the claim of an united Vietnam over the Spratlys was based on succession from that of South Vietnam and did not violate the *estoppel* principle.

4.2. Title claimed by China

In 1949, the Communist Party's victory in the mainland forced the Nationalist Party to flee to Taiwan. Similar to Vietnam, this led to the recognition of two governments of China, the People's Republic of China (PRC) in the mainland and the Republic of China in Taiwan, during the 1960s. With regard to title over the Paracels and Spratlys, despite China's absence from the San Francisco Conference, in August 1951, Chou En-Lai, Foreign Minister of the People's Republic of China (China) reacted to the San Francisco Draft stating that

> the draft deliberately stipulates that Japan shall renounce all claims to Nan-wei (Spratlys) Island and to Hsi-sha (Paracels) Archipelago, but does not mention the problem of the restitution of sovereignty. In fact, the Paracels Archipelago and Spratlys Island, as well as the whole Spratlys Archipelago, and the Chung-sha (Macclesfield Bank), and Tung-sha (Pratas) archipelagos have always been Chinese territory. Though occupied for some time during the war of aggression unleashed by Japanese imperialism, they were taken over by the then Chinese government following Japan's surrender. The Central People's Government of the People's Republic of China declares herewith: The inviolable sovereignty of the People's Republic of China over Spratlys Island and the Paracels Archipelago will by no means be impaired, irrespective of whether the American-British draft for a peace treaty with Japan should make any stipulations and of the nature of any such stipulations.[340]

China also claimed that Article 2(f) of the San Francisco Treaty was implied to recognise such title of China as in a bilateral meeting with Japan on territory issues, Japan repeated the renouncement of her rights to all of the occupied territories before the Second World War.[341] However, at the San Francisco conference, the USSR proposed an amendment that would have made the San Francisco Peace Treaty provide for a recognition of China's sovereignty over Taiwan, Pratas, the Pescadores, the Paracels, the Spratlys and Macclesfield Bank. The proposal was, however, rejected by 46 of the 52 conference participants.[342]

In order to clarify Article 2(f) of the San Francisco Treaty, the examination of previous or subsequent treaties concluded in relevant issues might be useful. If the provisions of the San Francisco Peace Treaty are read together with two earlier agreements between the Allies, it becomes clear that China has no tenable claim to sovereignty over either the Spratlys or the

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[340] Quoted in Samuels, *op.cit.*, note 5, p.79.
[341] Article 2(f) states "Japan renounces all right, title and claim to the Spratlys Islands and the Paracels Islands". Quoted in Odgaard, *op.cit.*, note 16, p.65.
[342] Valero, *op.cit.*, note 254, p.331.

Paracels. Firstly, the Cairo Declaration of 27 November 1943, issued by the UK, USA and Chiang Kai-Shek's Nationalist China, declared that it was the purpose of the Allied Powers to strip Japan of "all the islands in the Pacific which she seized or occupied since the beginning of the First World War in 1914, and that all the territories that Japan had stolen from the Chinese, such as Manchuria, Formosa and the Pescadores, shall be restored to the Republic of China", without mentioning either the Spratlys or the Paracels. Secondly, the omission in the Cairo Declaration was later affirmed in the Postdam Declaration issued by the USSR, UK and USA on 2 July 1945. This constituted an international acknowledgement that neither of the disputed archipelagos was Chinese territory. By making the distinction between the "islands in the Pacific", on the one hand, and the "territory stolen from China", on the other, without including the Spratlys and Paracels in the latter class, the Cairo Declaration may be construed as indicating that the archipelagos were not considered Chinese territories.[343] Moreover, in a Joint Communiqué on the 29 September 1972 between the PRC and Japan, the latter recognised the PRC as the sole legal government of China and reaffirmed its stand of complying with the terms of the Postdam Declaration which, by reference to the Cairo Declaration, specifically mandates the return of Taiwan and the Pescadores, but not the Spratlys and the Paracels, to China.[344] Therefore, Article 2(f) of the San Francisco Treaty did not have any implied stipulation concerning the title of China over the Paracels and Spratlys (as China claimed). Thus, the statement of the Foreign Minister in 1951 might be considered as the first time that China made an official claim to the Spratlys. This claim was not followed by any physical presence in the Spratlys. However, China frequently reiterated its claim from 1951 to 1960.[345] Among these statements, the one that is noteworthy is the Declaration on Territorial Sea which China issued in September 1958. This Declaration extended China's territorial sea waters to the 12 nautical mile limit and announced the application of the straight baseline method for China's coastal lines, the Paracels Islands, Macclesfield Bank, Spratlys Islands and all other islands belonging to China.[346]

With regard to Taiwan, following the surrender of Japan, it took over from Japan the occupation of the Paracels and Spratlys. However, this occupation did not include all features of the Spratlys and was disrupted sometime from 1950 to 1956 when Taiwan faced difficulties

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[343] Valero, *op.cit.*, note 254, p.331.
[344] *Ibid.*
[345] For details, see Samuels, *op.cit.*, note 5, p. 86-89.
[346] Point 2 and 4 in the Declaration, for full text, see Greenfield, Jeanette, *China's Practice in the Law of the Sea*, (Oxford: Clarendon Press, 1992), Appendix 1.

in the conflict with mainland China. The occupation by Taiwan originated from the placement of the two archipelagos under the jurisdiction of the Governor General of Taiwan through the Kao-hsiung District by Japan. However, as Japan had no legal right to the two archipelagos, it could not transfer any rights to Taiwan. Furthermore, the occupation by Taiwan was at the Itu Aba Island, a feature which was included in the 1933 sovereignty declaration of France. As the title of France was well established in the colonial period, and then was transferred to the South Vietnamese government, the occupation by Taiwan was illegal and could not have any effect on establishing title to the Spratlys. Thus, irrespectively the fact that Taiwan would be considered as either an independent party or a part of China, the occupation by Taiwan of Itu Aba was not an effective occupation in the Spratlys.

4.3. Title claimed by the Philippines

In 1956, Thomas Cloma, a Philippines's businessman 'discovered' some features in the Spratlys archipelago. He later named these features as Kalayaan ('Freedom land' in the Philippines' language), planted the Philippines' flag and claimed the ownership of it.[347] Cloma's discovery was strange as the archipelago had been long known by the states in the South China Sea region after the sovereignty declaration and occupation by France since 1933 and the occupation by Japan during the Second World War. In fact, there was little room to explain the so-called 'discovery'. From 1950 to 1956, after Japanese and French troops withdrew from the Spratlys, due to changes in the domestic situations of both China and Vietnam, the Spratlys, in this period, was unoccupied. The San Francisco conference ended with the renouncement by Japan of the Paracels and Spratlys but no clarification on the title of either of them. Therefore, Cloma took this opportunity to "discover" the major part of Spratlys including Spratly Island, Itu Aba, Nam Yit Island, Thitu Island, North Danger Reef, Mariveles Reefs, etc. The discovery was then developed into a claim and stated by Cloma's declaration on 21 May 1956 that "the claim was made by citizens of the Philippines, and not 'on behalf of the Government of the Philippines', because we were not authorised to do so. This will, however, have the consequent effect of the territory becoming part of the Philippines."[348] The official response of Philippine government showed their hesitancy and it was not clear whether they supported or opposed

[347] Odgaard, *op.cit.*, note 16, p.66.
[348] Quoted in Samuels, *op.cit.*, note 5, p.82.

Cloma's claim. This could be seen in the note of the Vice President of the Philippines in December 1956:[349]

> As regards the seven-island group known internationally as Spratlys, the Philippines government considers these islands under the *de facto* trusteeship of the victorious Allied Powers of the Second World War, as a result of the Japanese Peace Treaty, signed and concluded in San Francisco on September 8, 1951, whereby Japan renounced all its rights, title and claim of the Spratly Islands and to the Paracel Islands, and there being no territorial settlement made by the Allied Powers, up to the present with respect to their dispositions. It follows, therefore, that as long as this group of islands remain in that status, it is equally open to economic exploitation and settlement by nationals or any members of the Allied Powers in the basis of equality of opportunity and treatment in social, economic, and commercial matters relating thereto.

When Cloma failed to convince Philippine government, he declared, on 6 July 1956, the establishment of a separate government for the 'Free Territory of Freedomland' with its capital on Flat Island.

Examining the legal significance of the 'discovery' by Cloma in 1956, one could easily see that it was carried by an individual, without the authorisation of Philippine government and later, as shown by the statement, was not endorsed by Philippine government. Moreover, the object of the discovery, the Spratlys, as identified in the Vice President's note was known internationally and in fact it was of title of South Vietnam, thus it was not *res nullius*.[350] The actions of Cloma were also met with strong protests from France, Britain and the Netherlands.[351] Therefore, the act of Cloma in 1956 did not comply with international law in acquisition and thus could not have the effect of establishing the Philippines' title to the Spratlys. In fact, except for the claim from Cloma, Philippine government, through the above mentioned statement did not make any sovereignty claim over the Spratlys.

This situation was changed in 1971 when Taiwan opened fire on a Philippines' boat in response to the Philippines's demand that Taiwan withdraw from the Itu Aba Island. This request was followed by a declaration that 53 islands, cays, shoals and reefs, known as Kalayaan and occupied by Thomas Cloma in 1956 belonged to the Philippines. Among 53 features claimed by the Philippines, 10 may generate full maritime zones,[352] namely the Itu Aba Island, Loaita Islands, Thitu Island, Sand Cay, Nanyit Island, West York Island, Flat

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[349] Quoted in *ibid*, p.83.
[350] The Note of the Vice President mentioned the seven islands which constituted the internationally known Spratlys implicitly referred to in the list of Spratlys' features in France's Sovereignty Declaration in 1933.
[351] See Samuels, *op.cit*, note 5, p.81-86.
[352] According to the result of Chapter 2, *supra*.

Island, Nanshan Island, Northeast Cay and Southeast Cay. The Philippines also started to deploy a military force on three Spratlys features. Taiwan refused to move from Itu Aba, and denied having carried out the shooting incident. South Vietnam and China also protested against the move of the Philippines. Despite ignoring Thomas Cloma's claim in 1956, the Philippines reaffirmed their claim in 1972 and expanded their military occupation.[353]

1971 was the first time the Philippines made an official claim that it had title to 53 features which it "regarded as *res nullius* and may be acquired according to the modes of acquisition recognised under international law which are occupation and effective administration".[354] In addition, in a Presidential Decree in 1978, the Philippines further stated that the Kalayaan Island Group "does not legally belong to any state or nation, but by reason of its proximity, ... vital security, ... history, indispensable need and effective occupation and control, established in accordance with international law ... must now be deemed to belong and subject to the sovereignty of the Philippines".[355]

The claim of the Philippines was based on geographical proximity or contiguity which was sometimes used by the other states in the nineteenth century. The claim was based on the argument that islands close to the land territory of a state, but outside the territorial sea, were claimed on the basis of contiguity doctrine. In the *Islands of Palmas* case, one of the contentions of the United States in respect of sovereignty over the Island of Palmas was based on its proximity to the Philippines. However, the arbitrator rejected this argument and remarked that "[a]lthough States have in certain circumstances maintained that islands relatively close to their shores belonged to them in virtue of their geographical situation, it is impossible to show the existence of a rule of positive international law to the effect that islands situated outside territorial water should belong to a State from the mere fact that its territory form the *terra firma* (nearest continent or islands of considerable size)".[356] Furthermore, Judge Huber clarified that isolated acts of display of sovereignty carried more weight than continuity of territory, even if such continuity was combined with the existence of natural boundaries.[357] Thus, contiguity, unaccompanied by effective occupation cannot serve as an independent basis for territorial claims. Effective, peaceful and continuous display of state authority is the sole test for

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[353] Odgaard, *op.cit.*, note 16, p.68.
[354] Quoted in Samuels, *op.cit.*, note 5, p.89.
[355] Presidential Decree No. 1599, quoted in Valencia *et al.*, *op.cit.*, note 16, p.34.
[356] *Island of Palmas Arbitration* (1928) 2 RIAA, p. 829 at p. 854-855, reprinted in (1928) 22 *AJIL* 867 at 893.
[357] *Ibid*, p.894.

acquiring sovereignty over *terra nullius*. The decision of the Permanent Court in the *Eastern Greenland* case[358] also followed this precedent by giving the title over Greenland to Denmark, a country further away than Norway and the other claimants.

With regard to the relevance of contiguity doctrine to sovereignty claims, some scholars further suggested that the importance of contiguity to title was relative and in certain circumstances, the legal consequences could prove to be determinative, at the initial state of title, if it was conjoined with effective occupation of the territory and if there was no competing superior state authority of another state.[359] Therefore, contiguity of territory could be valid consideration under international law only within the general framework of the process of territory acquisition.

In this case, Philippine claim was merely based on proximity and was not supported by any effective occupation, except the 'discovery' and occupation of Cloma. However, as analysed above, the 'discovery' in 1956 was conducted by an individual who was not authorised or endorsed by Philippine government, thus might not be a legal ground for Philippine title. Title to a territory is "created as a consequence of legal procedure relating to the establishment and recognition"[360] and geographical proximity alone does not confer title to land territory.[361] Although its distance to the centre of the Spratlys is the shortest,[362] the Philippines could not rely solely on geographical proximity to claim sovereignty over the Spratlys.

4.4. The new claimants: Malaysia and Brunei

Malaysia entered into the dispute by publishing a map of its continental shelf, including 3 features of the Spratlys, in 1979.[363] In 1983, Malaysia occupied and officially claimed sovereignty over these features by stating that Swallow Reef "has always been and is part of the territory of Malaysia".[364] Malaysia further developed her claims into four features in the

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[358] *Eastern Greenland* case, PCIJ, Series A/B, No.53.
[359] Lauterpacht, "Sovereignty over Submarine Areas" (1950) 27 *BYIL* 417 at 428-29; Waldock, "Disputed Sovereignty to the Falkland Islands Dependencies" (1948) 25 *BYIL* 342 at 343-44; Surya P Sharma, "Relevance of the 'Contiguity' Doctrine to International Disputes including the Spratly Dispute" (1992) *Journal of Malaysia Comparative Law*, 81 at 86.
[360] Ian Brownlie, *op.cit.*, note 214, p.127.
[361] Y Jennings, *op.cit.*, note 216, p.74-76; and *Island Palmas Case*, 1928, 2 RIAA, p.829, reprinted in (1928) 22 *AJIL* 867 at 893-4.
[362] For distance from Spratlys to littoral states in the South China Sea, see *supra*, Chapter 1and *infra*, Figure 33.
[363] Mark J. Valencia, *Malaysia and the Law of the Sea*, (Malaysia: Institute of Strategic and International Studies, 1991), p.66.
[364] Odgaard, *op.cit.*, note 16, p. 70.

Spratlys, namely the Ardasier Reef, Swallow Reef, Royal Charlottes Reef and Louisa Reef, in the statement of the Malaysian Deputy Foreign Minister in 1988 in which he said that they are "within Malaysia's continental shelf area".[365] China and Vietnam soon opposed Malaysia's actions. The Philippines also went further by awarding some contracts to foreign oil companies in the Reed reef, east of the Spratlys, in 1978. It also established an administrative body for the Spratlys in 1988.[366]

Brunei was the last claimant entering the dispute. After gaining independence in 1984, Brunei inherited a continental shelf partly delimited by the United Kingdom. On behalf of Brunei, the United Kingdom already protested the Malaysian claim to the Louisa Reef on its 1979 map.[367] In 1987 and 1988, the Surveyor General of Brunei reportedly printed a map to define the fishery and continental shelf of this country which included the Louisa Reef.[368] However, Brunei took no actions to fortify its claims.

The claims of Malaysia and Brunei are based on a reverse application of the continental shelf doctrine. As under the international law of maritime delimitation, "land dominates the sea" has been well recognised, it is the land which gives rise to the maritime zones including the continental shelf area, and not vice versa. In the dictum of the *North Continental Shelf* case,[369] concerning the relations between a title to a territory, continental shelf and adjacency, it was stated that "it is evident that by no stretch of imagination can a point on the continental shelf situated say a hundred miles or even much less, from a given coast, be regarded as 'adjacent' to it, or to any coast at all, in the normal sense of adjacency, even if the point concerned is nearer to some one coast than to any other".[370] Moreover, continental shelf rights do not themselves amount to sovereignty but are restricted to sovereignty rights in exploring and exploiting the sea bed and subsoil of the submarine areas as nowhere in Article 76 (which describes in detail what constitutes the continental shelf) and 77 (which outlines the sovereign rights of a state for the purpose of exploring and exploiting the resources of its continental shelf) is there reference to how sovereignty rights over islands themselves is to be

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[365] Mark J. Valencia *et al.*, *op.cit.*, note 16 , p.36.
[366] Chemillier-Gendreau, *op.cit.*, note 35, p.55.
[367] Although the claim of Brunei took place in the 1980s, it shared the same nature as the claim of Malaysia. For the ease of the readers and to list the full members of the parties to the dispute in this chapter, Brunei's claim was discussed in this period along with Malaysia's claim.
[368] Daniel J. Dzurek, *op.cit.*, note 39, p.22.
[369] *North Continental Shelf Case, Judgment,* ICJ Reports (1969), p.3 (hereafter referred to as *North Continental Shelf* case), at para.41.
[370] *Ibid,* para.41.

determined.[371] According to the examination in Chapter 2 of this thesis, the Swallow Reef, Royal Charlottes Reef and Louisa Reef are islands under the definition of Article 121(1) of the 1982 LOSC, thus the sovereignty over these islands must be acquired under international law concerning territory acquisition, not by the application of continental shelf regime.[372] Therefore, the arguments of Malaysia and Brunei for their claim to these reefs are groundless.

4.5. The stronger claim from the end of the Second World War to 1980

The end of the Second World War and the new development of the international law of the sea created a complicated situation for the South China Sea dispute. After the Second World War, Japan renounced all rights and title, but the San Francisco Treaty did not clarify the fate of the Paracels and Spratlys. China made its first official claims to the Spratlys, but did not have any occupation in the archipelago. Taiwan's title was illegally transferred from Japan, thus its occupation in the Itu Aba Island could not be considered effective occupation. Also in this period, Vietnam was divided into two states: the North and the South. North Vietnam, by the statement of Premier Pham Van Dong of 1958 and 1965, excluded itself from the dispute and in fact, it did not have any occupation in the Spratlys. Meanwhile, South Vietnam legally succeeded to the claim of France and maintained effective occupation in the Spratlys. At the end of this period, the united Vietnam, as a new states created by the merger of the North and South Vietnams, succeeded the claim of South Vietnam over the Spratlys.

With the effect of the 1982 UNLOSC in heightening the awareness of littoral states about the role of islands in generating maritime zones, the Philippines, Malaysia and Brunei entered the dispute. Based on a broad interpretation of the 1982 LOSC, the claims of Malaysia and Brunei reveal many weaknesses. The claim of the Philippines was also not very well based on international law as it was merely based on the proximity doctrine. The only occupation was taken by Cloma in 1956 as an individual without authorisation or endorsement by the Philippine government.

In sum, although there were the new entrants of the Philippines, Malaysia and Brunei, the main competition over the claim was still between China and Vietnam. Despite facing difficulties in its domestic situation, Vietnam still held the strongest position based on its legitimate claim and occupation. Taiwan, although in a weaker legal position, had an advantage

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[371] Brian K. Murphy, "Dangerous Ground: The Spratly Islands and International Law" (1994-1995) *Ocean & Coastal L. J.*, 187 at 199.
[372] For details of the analysis, see *supra* Chapter 2, section 2.

by its military presence on the biggest island, the Itu Aba. The PRC was in the weakest position as it had only made the first official claim over the Spratlys, but did not have any control and occupation.

5. Further developments strengthening claims of the parties from 1980 to the present

5.1. The military activities of China

With the new occupation of Malaysia and the expansion of the military forces of Vietnam and the Philippines in the Spratlys, China was the only party that did not land troops in this archipelago. Recognising this weakness, China issued a publication by the Ministry of Foreign Affairs of China named "China's indisputable sovereignty over the Xisha and Nansha Islands" in 1980.[373] From this document, China states that the Spratlys archipelago has "always been part of Chinese territory".[374] Furthermore, in 1988, making use of the isolated situation of Vietnam, China initiated a military attack against Vietnam. This resulted in the loss of at least 70 Vietnamese soldiers and two warships and instituted Chinese occupation in 7 features of the Spratlys.

This was the second use of force by China, and the more serious, the first being at the Paracels in 1974. This act violated international law on the prohibition of the use of force in international relations which is clearly recognised in Article 2(4) of the UN Charter, which, certainly, since the *Nicaragua* case[375] has become international customary law. The act of China expressed the unwillingness of China in using any judicial institution to solve the dispute, instead, it was willing to occupy the Spratlys' features by any means including the illegal use of force. The 1988 incident also had the negative effect of igniting the militarisation of the dispute. Other parties including the Philippines, Vietnam and Malaysia deployed their military forces and occupied as much as possible in order to cope with the threat from China.

The 1990s continued to demonstrate a big difference between China's words and deeds in its policy towards the South China Sea dispute. On the one hand, for the first time, China's Prime Minister Li Peng stated that China accepted a joint development solution for the

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[373] Full text can be found in Beijing Review, 18 February, 1980 and in UN Doc. A/35/93:S/13788.
[374] China's Ministry of Foreign Affairs, *China's Indisputable over the Xisha and Nansha Islands,* (Beijing, 1980) in (1980) 21*Beijing Review*, p. 15.
[375] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA), Merits, Judgment* ICJ Reports (1986), p.14 (hereafter referred to as the Nicaragua case), at para.188.

Spratlys.[376] On the other hand, China built permanent structures on the Fiery Cross Reef in the same year. China also conducted regular patrols, set up a weather station and expanded its occupation.[377] Moreover, in 1992, China awarded an exploitation contract to a small oil company, Crestone of the United States, in the Vanguard Bank and the Blue Dragon Area, which Vietnam considered part of its continental shelf.[378] Most noteworthy, in 1995, China expanded its occupation in the Mischief Reef and had military clashes with the Philippines there.[379]

After the Mischief Reef incident, there was no further use of military action to consolidate occupation. There were only several small clashes related to illegal fishing, e.g. in 2000, the Philippines opened fire at Chinese vessels and killed the captain.[380] Also, there was a clash between a United States Navy EP-3 Aries intelligence aircraft and a Chinese F-8 fighter plane over the South China Sea which China considered within its sovereignty claim.[381]

5.2. The reaction of other claimants

In reply to China's moves, Vietnam not only sent protests, but also awarded a concession in the same area to another US oil firm, Conoco and later to Mobil in 1996. Vietnam increased its possessions in the Spratlys to 21 features in 1992. Vietnam installed television receiving stations, a fishing port and coastal artillery and anti-aircraft guns on a number of features. The Philippines also reacted strongly after the Mischief incident. The Philippines reinforced its garrison in the Thi Tu Island and conducted regular patrols by armed forces to inspect China's activities in the Mischief Reef. Malaysia also expanded its control in the Spratlys by opening a tourist resort on the Swallow Reef and building a military station in 1991.

To some extent, the expansion of China in this period brought unity to the other claimants, especially after the Philippines became the next victim and Vietnam joined ASEAN

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[376] In an interview with reporters of Singapore's newspaper on 20 August 1990, Premier Li Peng said that "under the premise that China has indisputable sovereignty over the Nansha Islands, China is willing to temporarily shelve the question of sovereignty over Nansha so as to joint develop the resources in Nansha together with ASEAN countries" (Quoted in Chen Hurng-yu, "A Comparison Between Taipei and Peiking in Their Policies and Concepts Regarding the South China Sea" (9/2003) *Issues and Studies* 22 at 45). This statement was also reiterated in the visit to Malaysia and the Philippines of Premier Li in December 1990 and April 1991 respectively.

[377] Odgaard, *op.cit.*, note 16, p.72.

[378] Timor, *op.cit.*, note 9, p.20.

[379] For details, see Odgaard, *op.cit.*, note 16, p.73-77.

[380] Other clashes over fishing rights were discussed in Chapter 1, Section 2.2, *supra*.

[381] Timor, *op.cit.*, note 9, p.1 and 20.

in 1995. Under the initiation of Indonesia, the South China Sea Workshops were held to create a negotiating forum for the countries in the region on the South China Sea dispute, in the 1990s. With the participation of China in the second workshop in 1991, it was the first time that China had to accept to join in a multilateral negotiating forum. However, the progress made by these workshops is minimal as China's claim to sovereignty over the Spratlys, as well as the other South China Sea island groups is non-negotiable. In 2002, after much effort, the most important achievement of the negotiations was the concluding of the Declaration on the Code of Conduct (DOC) in which principles for the conduct of the parties in the South China Sea dispute were set out. Unfortunately, this document only had recommendary effect.[382]

5.3. The latest development

With only recommendary effect, the DOC has proved unable to prevent the parties from escalating their claims. There have been some bad incidents in the South China Sea recently. Taiwan showed its displeasure at being excluded from the DOC by searching and expelling Vietnamese fishing boats from the Spratlys area in October 2003. Vietnam, for its part, also moved forward to launch tourist visits in the Spratlys archipelago at the same time. China still exploited fishing resources in the disputed areas.[383] Furthermore, the Philippines media reported on 7 November 2003 that their Armed Forces discovered new territorial markers with Chinese inscriptions on several unoccupied reefs and shoals in the Spratlys archipelago and had monitored two Chinese navy vessels operating since September at the Mischief Reef. The new markers, however, were then reportedly moved.[384]

The tensions in fishing rights and new markers was suspended recently due to the fact that the Philippines and China entered into an agreement for joint exploitation in yet-to-be selected areas of the South China Sea, between the Philippines National Oil Company and the China National Offshore Oil Corporation, on September 2003.[385] This new arrangement worries the other claimants as it shows that China is gaining initial success in its policy of settlement in the South China Sea through bilateral negotiations. However, Vietnam also joined in this agreement in March 2005. This movement was hailed as a diplomatic breakthrough for

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[382] For further, see Chapter 5, Section 3.1.2, *infra*.
[383] *Supra*, Chapter 1, section 2.2.
[384] Sources: The Comparative Connection, Pacific Forum 's Quarterly Electronic Journal on East Asian Bilateral Relations, Volume of 4th quarter 2003, online at http://www.csis.org/pacfor/ccejournal.html (accessed on 2 February 2005) .
[385] The Press Release of The Department of Foreign Affairs of the Philippines, online at http://www.dfa.gov.ph/news/pr/pr2004/sep/pr524.htm (accessed on 19 October 2004).

peace and security in the region and led to a hope for substantial cooperation for the South China Sea dispute. Feeling excluded, Taiwan on 23 March 2004 sent a ship and installed a "bird observation station" on Banthan low tide elevation and on 16 December 2005 deployed 600 more soldiers and built an air strip in the Itu Aba Islands.[386] Most recently, on 12 and 13 February 2007, Taiwan conducted military maneuver at water in the west of Itu Aba Island. These activities received constant protest from the Vietnamese government.[387]

5.4. Conclusion on the current position of the parties in the dispute

The latest development of the dispute demonstrated that China is decisive in maintaining its claim in the Spratlys. It is willing to use all means to protect its "national sovereignty", even by the illegal use of force against any country which challenges its interest. However, a ray of hope for the dispute settlement appeared in the guise of the new agreement between China, the Philippines and Vietnam, and the suspension of serious military tension in the last decade. Notwithstanding, all the practice in the last period only has the effect of strengthening, but does not change the legal status of the claims of all parties.

From the analysis of Chapter 2, the Spratlys are not an archipelago in legal terms. The consideration of the Spratlys as one group is convenient as all features of the Spratlys share the same geographical location and history. Thus, the presence of multiple sovereignty claims to many features of the Spratlys may be considered as a series of conflicting claims which some claimants contested more than others. Also, from the analysis of the legal regime of the Spratlys, these sovereignty claims will have significant effect particularly with 12 islands which can generate full maritime zones.

Through much upheaval in the historical development of the region, the Spratlys is now an object of overlapping sovereignty claims among six parties. China and Taiwan claim the entire Spratlys on the basis of historical title. However, this claim faced the problem of authenticity and accuracy. In addition, China only has its occupation of 10 features of the Spratlys since 1988 by illegal use of force, but none of them may generate full maritime

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[386] Taiwan built 1,150-meter runway and a control tower on the island in order to handle the takeoff and landing of C-130 aircraft, but insisted in public that the airstrip was intended for 'humanitarian purposes' such as emergency rescue efforts for sick or injured merchant seamen or fishermen who might encounter difficulties in the treacherous waters. Sources: Central News Agency, "Government Has Plans for Airstrip on Taiping Island", Taipei Representative Office in the U.K., *Taiwan Update* No. 49, December 16, 2005, at http://www.roc-taiwan.org/UK/TaiwanUpdate/ns1151205m.htm (Accessed on 4 January 2007).

[387] For Vietnamese declaration on these incidents, see website of the Ministry of Foreign Affairs of Vietnam: http://www.mofa.gov.vn/en/tt_baochi/pbnfn/ns070214165133 (accessed on 12 March 2007).

zones.[388] Taiwan occupies only one feature which may generate full maritime zones, but from the invalid transfer of title by Japan.

Brunei and Malaysia were the last as well as the weakest parties in the dispute. They claim a few features, none of them may generate full maritime zones, on the basis that these features locate on their continental shelf. This is a reverse application of international law and cannot help these countries establish title as the 1982 LOSC only stipulates the rights of coastal states towards the continental shelf base on their entitlement from their mainland and islands. In fact, Malaysia occupies 6 features, but none of them may generate full maritime zones. Brunei is the only country which does not have any occupation to demonstrate its claim.

The Philippines claims the large number of features in the Spratlys, including 10 islands that may generate full maritime zones, based on the 'discovery' of Cloma in 1956 and the proximity doctrine. However, the 'discovery' of Cloma in 1956, was conducted by an individual and was not authorised or endorsed by the Philippines government until their first official claim in 1971. In addition, merely basing a claim on proximity cannot enable the Philippines to establish title over the Spratlys under international law. However, the Philippines currently occupy 8 features of which 6 may generate full maritime zones.

Vietnam claims the entire of the Spratlys on the basis of historical title from the official documents of the Kingdom of Annam which recorded the intention to establish title over the Spratlys in the seventeenth and eighteenth centuries. Vietnam also claims on succession the title established by France in 1939. The succession title from France was claimed based on the protectorate relations between France and Vietnam under the Patenôtre Treaty of 1884 and the official transfer of control in the Spratlys of France to the South Vietnamese authority in 1950. From this time South Vietnam claimed and exercised its authority over the Spratlys until it transferred this right to the Provisional Revolutionary Government in 1975 and the united Vietnam in 1976. Currently, Vietnam occupies 21 features, the largest number of features, of which 5 features may generate full maritime zones. Thus, Vietnam holds the strongest position on legal argument on the dispute.

The occupation situation and the claims of the parties in the Spratlys with the legal status of the occupied features (which are achieved from Chapter 2) can also be illustrated by the following map:

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[388] For details of the names of the features in the Spratlys, see Annex 2, *infra*.

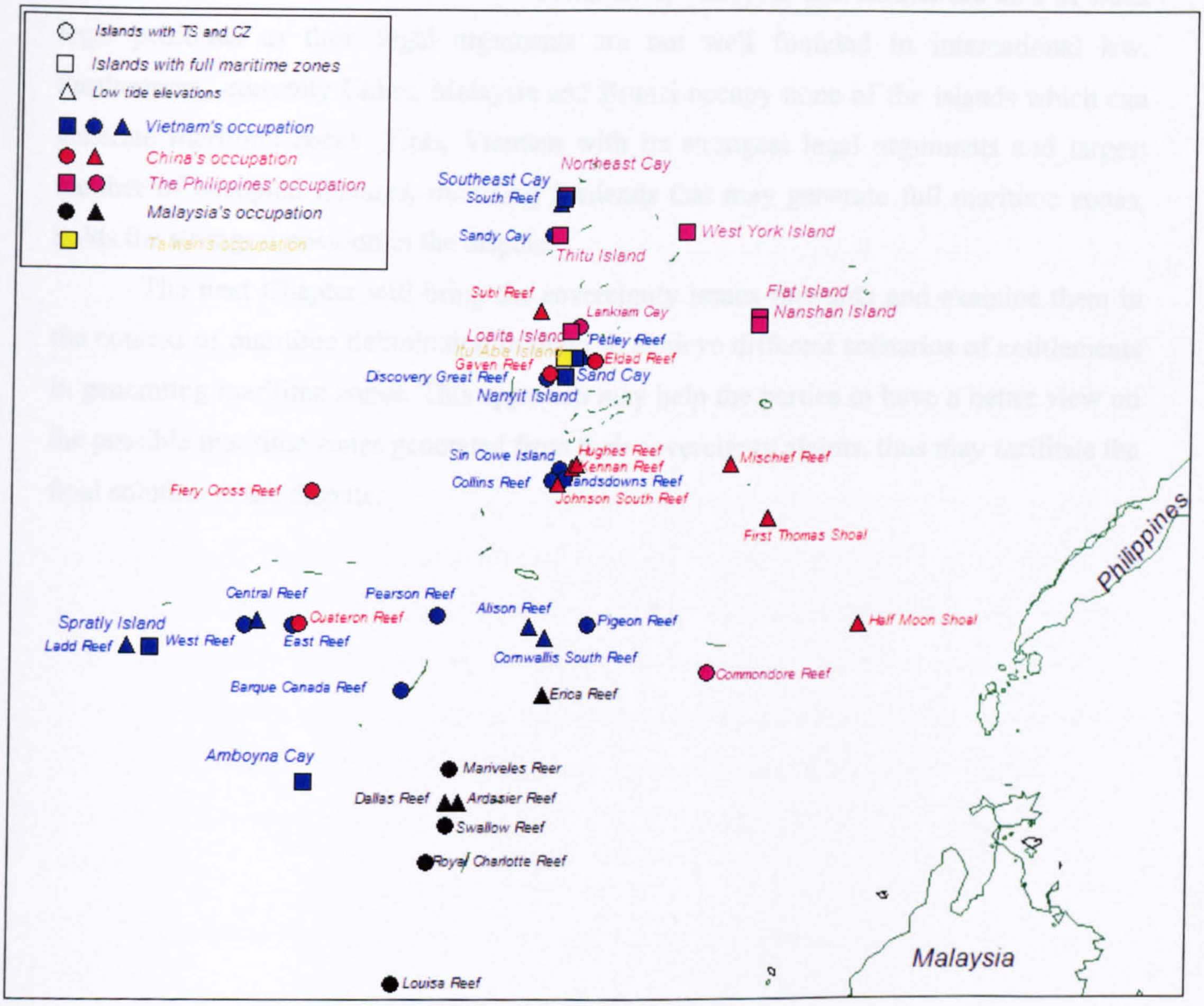

Figure 21. Spratlys features, their occupants and jurisdictional claims[389]

6. Conclusion

Over the centuries of historical development, the South China Sea dispute currently has six parties. China and Taiwan are sharing the same claim over the entire of the Spratlys on the basis of historic title. Vietnam also claims the entire of the Spratlys on historic title and succession. The Philippines claim a large of features, including 10 islands which may generate full maritime zones, on the basis of discovery and proximity. Malaysia and Brunei claim a small number of features on the basis that these features locate on their continental shelf, but none of them may generate maritime zones. However, the legal analysis from this

[389] Map drawn by Mapinfo.

Chapter reveals that with the problem of authenticity and accuracy, China and Taiwan have some weaknesses in their claims. The Philippines, Malaysia and Brunei are also in weak legal positions as their legal arguments are not well founded in international law. Furthermore, currently China, Malaysia and Brunei occupy none of the islands which can generate maritime zones. Thus, Vietnam with its strongest legal arguments and largest number of occupied features, including 5 islands that may generate full maritime zones, holds the strongest position in the dispute.

The next Chapter will bring the sovereignty issues forwards and examine them in the context of maritime delimitation in order to achieve different scenarios of entitlements in generating maritime zones. This approach may help the parties to have a better view on the possible maritime zones generated from their sovereignty claims, thus may facilitate the final solution to the dispute.

CHAPTER 4. PROSPECTS FOR MARITIME DELIMITATION FOR THE WATERS OF THE SPRATLYS

1. Introduction

In addition to the sovereignty issue, maritime delimitation is the second major issue in the South China Sea dispute. Of the six claimants to the South China Sea dispute, China and Taiwan claim a vast maritime area, based on historical title, which even covers large parts of maritime spaces from the mainland of Vietnam, Malaysia, Brunei and the Philippines. With the presence of the Spratlys and its effect in generating maritime zones, the maritime spaces generated from the coastlines of Vietnam, Malaysia, Brunei and the Philippines might also overlap with each other. This chapter will examine the overlapping in detail and analyse how the international law relating to maritime delimitation will be applied to a possible maritime delimitation in the waters of the Spratlys. This might not arrive at a concrete maritime boundary as there is no solution to the sovereignty issues at the moment. However, it will lay out all the elements for the maritime delimitation process for different scenarios. Also, it will analyse the effect of the Spratlys in maritime delimitation and thus clarify the actual role of the Spratlys in generating maritime zones for the parties concerned. Before going on to analyse the situation of the South China Sea, it will be necessary to introduce the applicable law from the international law concerning maritime delimitation.

2. Contemporary international law concerning maritime delimitation

2.1. The method for maritime delimitation

The maritime delimitation process requires the identification of an appropriate method of delimitation in accordance with the appropriate relevant circumstances of each case. The result of this process is the equitable solution.[390] The development of the law concerning maritime delimitation is currently well established and the starting point of any delimitation is the entitlement of a state to a given maritime area. The concept of distance as the basis of entitlement become increasingly intertwined with that of natural prolongation by referring to the provisions of Article 76 on continental shelf and Article 56 on EEZs of the 1982 LOSC.[391]

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[390] Malcolm Evans, "Maritime Boundary Delimitation: Where Do We Go from Here?" in David Freestone, Richard Barnes and David Ong, *The Law of the Sea: Progress and Prospects*, (Oxford: Oxford University Press, 2006), p.137 at 145.

[391] *Barbados v. Trinidad and Tobago Award*, 2006, paras.224-5.

The "equidistance/relevant circumstances" approach is the current recognised principle for the maritime delimitation process and has been applied in recent cases, namely *Qatar v. Bahrain,*[392] *Cameroon v. Nigeria,*[393] *Barbados v. Trinidad and Tobago,*[394] and *Guyana v. Suriname.*[395] Accordingly, the maritime delimitation method now calls for first determining, provisionally, the equidistance line and then asking whether there are any special circumstances or relevant factors requiring this initial line to be adjusted with a view to achieving an equitable solution.[396] The elements of an equitable solution in reaching a determination of a boundary line over maritime areas as provided for in Articles 74 and 83 of the 1982 LOSC, in conjunction with the broad reference to international law elaborates that "equitable considerations per se are an imprecise concept in the light of the need for stability and certainty in the outcome of the legal process".[397] This approach since the *Qatar v. Bahrain* case[398] has been recognised as being applied without distinction between opposite and adjacent coasts in maritime delimitation.[399] Since the equidistant method is the one which can ensure total predictability, the equidistance/relevant circumstances approach is also welcome as a means of enhancing the predictability of the law concerning maritime delimitation.

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[392] The Court in this case states "first provisionally draw an equidistance line and then consider whether there are circumstances which must lead to an adjustment of that line". (ICJ Report, 2001, p.40 at para.230).
[393] In this case, the Court stressed that "delimiting with a concern to achieving an equitable result, as required by current international law, is not the same as delimiting in equity. The Court's jurisprudence shows that, in disputes relating to maritime delimitation, equity is not a method of delimitation, but solely an aim that should be borne in mind in effecting the delimitation" (ICJ Report, 2002, para.294).
[394] The Tribunal in this case reaffirmed that "[t]he determination of the line of delimitation ...normally follows a two-step approach. First, a provisional line of equidistance is posited as a hypothesis and a practical starting point. While a convenient starting point, equidistance alone will in many circumstances not ensure an equitable result in the light of the peculiarities of each specific case. The second step accordingly requires the examination of this provisional line in the light of relevant circumstances, which are case specific, so as to determine whether it is necessary to adjust the provisional line in order to achieve an equitable result... Certainty is thus combined with the need for an equitable result" (2006 Award, para.242).
[395] The Tribunal in this case elaborated that "in the course of the last two decades international courts and tribunals dealing with disputes concerning the delimitation of the continental shelf and the exclusive economic zone have come to embrace a clear role for equidistance. The process of delimitation is divided into two stages. First the court or tribunal posits a provisional equidistance line which may then be adjusted to reflected special or relevant circumstances" (2007 Award, para. 335). In the latest case between Nicaragua and Honduras, although there were exeptional geographical situations giving rise to the decision of the Court not to apply the equidistance/ relevant circumstances in delimiting maritime zones for the two countries, the Court at the same time emphasized that "equidistance remains the general rule" (ICJ Report, 2007, para.281).
[396] ICJ Press Notice 2002/38. Also, see Evans, *op.cit.,* note 390, p.147.
[397] *Barbados v. Trinidad and Tobago Award*, 2006, para.230.
[398] Yoshifumi Tanaka, "Reflections on Maritime Delimitation in the Cameroon/Nigeria Case" (2004) 53 *ICLQ* 369 at 376.
[399] This was also reaffirmed in the *Barbados v. Trinidad and Tobago* case at para.315.

2.2. Relevant circumstances

Regarding the second stage in the maritime delimitation process, the specific criteria applicable to effect a delimitation, the judgments of recent cases concerning maritime delimitation show that the neutral criteria of geographical characteristics prevailed over area-specific criteria, such as geomorphological aspects or resource-specific criteria, such as the distribution of fish stocks (with very few exceptions).[400] In the *Eritrea/Yemen Arbitration*,[401] the Tribunal addressed four claimed relevant circumstances, namely proportionality, the perpetuation of the traditional fishing regime, the presence of gas and oil resources and the effect of mid-ocean islands, but only the last one was regarded as relevant in maritime delimitation based on the argument that certainly where territorial waters had to be delimited, the mid-sea islands could not be discounted altogether, and had to be somehow weighted.[402] In *Qatar v. Bahrain*, the Court considered only two among five examined circumstances relevant to maritime delimitation. The presence of low tide elevations and islands was considered as relevant circumstances,[403] whereas the security interests, economic interests and proportionality were rejected by the Court as

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[400] So far, the exception was only in the *Jan Mayen* case, 2006 Award, para.228.

[401] *Eritrea/Yemen Arbitration Award*, Permanent Court of Arbitration award series, (The Hague: T.M.C. Asser Press, 2005).

[402] With regard to proportionality, the technical expert carried out computations that the coastal length ratio Yemen: Eritrea was 1:1:31, while the equivalent water-areas ratio was 1:1:09. Although the test for equity by a reasonable degree of proportionality between coastline length and the areas appertaining to states was first recognised in the *North Continental Shelf* case and followed consistently in other cases, the Tribunal in this case considered that these rates resulted in no disproportion (paras.39-43 and 165-168 of the Award). Addressing the claim for the perpetuation of the traditional fishing regime, the Tribunal affirmed that "[n]either party had succeeded in demonstrating that the line of delimitation proposed by the other would produce a catastrophic or inequitable effect on the fishing activity of its nationals or detrimental effects on fishing communities and economic dislocation of its nationals" (para.72). Therefore, the Tribunal concluded that "the evidence and arguments advanced by the parties in the matter of fishing and fisheries could have no significant effect on the Tribunal's determination of the delimiting that would be appropriate under international law in order to produce an equitable solution between the parties" (para.74; For comment, see Antunes, "The 1999 Eritrea-Yemen Maritime Delimitation Award and the Development of International Law" (2001) 50 *ICLQ* 299 at 339). This view was also taken in the third issue regarding the gas and oil resources. The Tribunal noted that mineral resources have not yet been found in the area, thus it played no role in the delimitation. In addition, the Tribunal was not taking into account the pattern of oil concessions issued by both states which suggested the existence of a mid-sea separation line because such concessions had been issued before the decision on sovereignty (paras.75-86). The argument for the relevance of islands in maritime delimitation was at paras.119 and 154-5, however, the Tribunal did not give clear explanation of the reduced effect of the Zuqar and Hanish islands (paras.160-2).

[403] The low tide elevation Fasht al Azm was considered as a relevant circumstance due to the two possibilities that it would be part of Sitrah Island or it would be used as a basepoint creating an equidistance line or stand as an independent low tide elevation. The Court concluded that for both possibilities, it would lead to dis-proportionality, thus Fasht al Azm was a special circumstance that led to the adjustment of the delimitation line passing between Fasht al Azm and Qit'at ash Shajarah. (para.218). Also, the presence of a tiny island Qit'at Jaradah was also considered as relevant circumstance which led to the choice of a delimitation line passing immediately to the east of Qit'at Jaradah. However, the Court did not give a concrete explanation of the effect of this island on proportionality (para.219).

relevant circumstances.[404] In the *Cameron v. Nigeria* case, four elements were considered but all were rejected as relevant circumstances.[405] In the *Barbados v. Trinidad and Tobago* case,[406] six claimed relevant circumstances of flying fish activities, the relevant coasts and their projection, proportionality, regional consideration, activities of the parties in the dispute and entitlement of continental shelf beyond 200 nautical miles were examined by the Tribunal. However, again, the Tribunal arrived at a limited result of one relevant circumstance from the relevant coast and their projection and rejected the relevance of all others.[407] In the *Guyana v. Suriname* case, in both

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[404] Regarding the security interests that were claimed by Qatar, the Court was silent in this point. However, it was argued that with the shift of the delimitation line further Qatar mainland coast from the effect of the Fasht al Azm, the Court might have implicitly considered security interests (Yoshifumi Tanaka, "Reflections on Maritime Delimitation in the Qatar/Bahrain Case" (2003) 52 *ICLQ* 53 at 62). The Court did not take into account on economic interests as the pearling industry effectively ceased to exist a considerable time ago (para.236). Also, dealing with the recourse from Qatar to the proportionality test of the equity in maritime delimitation, the Court concluded that the disparity in the length of the coastal fronts of the parties could not be considered such as to necessitate an adjustment of the equidistance line (para.243).

[405] ICJ Report, 2002, p.303. In this case, first, the Court did not consider that the configuration of the concavity of the Gulf of Guinea and the coastline of Cameroon which expected to be very similar to the geography of the *North Continental Shelf* case represented a relevant circumstance. (For the claims of Cameroon based on its configuration coastline see ICJ Report, *ibid,* paras.272-3. For the Court conclusion on this issue see ICJ Report, *ibid,* para.297. For comment on the approach of the Court on this point, see Evans, *op.cit.,* note 390, p.150-1.) Second, the Court accepted that the presence of islands had sometimes been considered as a relevant circumstance, especially when such islands lie within the zone to be delimited and fall under the "wrong side" of sovereignty. In the present case, however, the Bioko Island is a territory of a third State, Equatorial Guinea. Thus, the Court concluded that the effect of the Bioko Island on the seaward projection of the Cameroonian coastal front was an issue between Cameroon and Equatorial Guinea and not between Cameroon and Nigeria; consequently, Bioko was not a relevant circumstance (paras.298-9). Third, the Court recognised that substantial differences in the lengths of the parties' coastlines might lead to the adjustment of the provisional delimitation line. However, in the present case, the Court held that whichever coastline of Nigeria was regarded as relevant, the relevant coastline of Cameroon was not longer than that of Nigeria and denied the relevance of proportionality (paras.300-1). Finally, although oil concessions have sometimes been relevant in the case law regarding maritime delimitation, such as the *Tunisia/Libya* (ICJ Report, 1982, p.18), *Gulf of Maine* (ICJ Report, 1984, p.246), *Guinea/Guinea Bissau* ((1986) 25 *ILM* 251) and *St Pierre and Miquelon (St Pierre and Miquelon Case* (1992) 31 *ILM* 1145*)* cases, in this case, the Court viewed that "oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provision delimitation line" (para.304).

[406] *Barbados v. Trinidad and Tobago Arbitration Award* (2006).

[407] The Tribunal recalled the judgments of the *Jan Mayen, Gulf of Maine and Libya/Malta* cases to conclude that coastal frontages was a circumstance relevant to delimitation and that their relative lengths might require an adjustment of the provisional equidistance line (*Jan Mayen* case, ICJ Report, 1993, para.68; *Gulf of Maine* case, ICJ Report, 1984, p.246, *Libya/Malta* case, ICJ Report, 1985, p.13. The Tribunal referred to these cases at para.327of the 2006 Award). However, this did not require the drawing of a delimitation line in a manner that was mathematically determined by the exact ratio of the lengths of the relevant coastlines. The degree of adjustment depended on the circumstances of each case (para.328). In the situation between Barbados and Trinidad and Tobago with the coastal length ratio generated from the coastal frontage between Trinidad and Tobago and Barbados being 8:2:1 in favour of the former, the Tribunal concluded that the broad coastal frontages of Trinidad and Tobago and the disparity in coastal lengths between the parties were relevant circumstances to be taken into account in the delimitation (2006 Award, paras.329 and 334).

Regarding flyingfish activities, the Tribunal found that although communities in Barbados were heavily dependent upon fishing and that the flyingfish fishery was central to that dependence, the evidence supporting Barbados's claim were distinctly fragmentary and inconclusive to support for the traditionally flyingfish fisheries off Tobago. Also, the Tribunal believed that "injury does not equate with catastrophe. Nor is injury in the course of international economic relations treated as sufficient legal ground for border adjustment"

delimitation for the territorial sea and the EEZ and continental shelf, the Tribunal have considered many claims of relevant circumstances, e.g.historic title, geogpraphical features, geographical configuration of the relevant coastlines, navigation interests and the conduct of the parties. However, only navigation interest was concluded as a relevant circumstance leading the adjustment of the maritime boundary for territorial sea delimitation.[408]

The application of the various criteria depended on the specific circumstances of each case, thus the identification of the relevant circumstances became a necessary step in determining the approach to delimitation.[409] However, the judgments of these recent cases create a trend that some objective criteria, namely natural prolongation, maritime projection of the relevant coastlines, proportionality and the presence of islands are usually taken into account. Meanwhile, resource-related criteria had been treated more cautiously. The emphasis on objective criteria also

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(paras.266-7). Thus, the Tribunal concluded that "even if Barbados had succeeded in establishing one or all of its core contentions, it does not follow that, as a matter of law, its case for adjustment would be conclusive" (para.269). With regard to proportionality, the Tribunal examined the development of the principle of proportionality in decisions of international courts and tribunals to conclude that "proportionality is a relevant circumstance to be taken into consideration in reviewing the equity of a tentative delimitation, but not in any way to require the application of ratios or mathematical determination in the attribution of maritime areas... [Proportionality plays the role of] final test to ensure that equitableness is not contradicted by a disproportionate result" (para.337). Therefore, in this case, the Tribunal would review the effects of the line of delimitation in the light of proportionality as a function of equity after having taken into account any other relevant circumstance (para.338). Regional consideration was claimed by Trinidad and Tobago from the treaties between Trinidad and Tobago and Venezuela and between France and Dominica. The Tribunal examined the context and content of those treaties and found that they were either not relevant or *res inter acta* in respect of Trinidad and Tobago and only reflected the limits of Barbados' maritime claim, thus could not be considered relevant in the maritime delimitation between Barbados and Trinidad and Tobago (paras.339-49). The parties also claimed some activities like seismic shoot and recognition of sovereignty as relevant circumstances. However, the Tribunal found that neither party conducted significant activity relevant to the exercise of its own claimed jurisdiction in the dispute area. The Tribunal held that oil wells, similar to the conclusion of the *Cameroon v. Nigeria* case are not in themselves to be considered as relevant circumstances, unless based on express or tacit agreement between the parties applicable in this context. Also, although the seismic activity was regarded as significant in the *Aegean Sea* case *(Aegean Sea* case, *Judgment,* ICJ Reports (1979), p.3*),* it was only applicable for the application of provisional measures, not definitive maritime boundary like in this case. Therefore, activities of either party, or the responses of each party to the activities of the other did not constitute a relevant circumstance (paras.361-6). Finally, with Trinidad and Tobago's claim of entitlement of continental shelf beyond 200 nm the Tribunal did not take it into account as relevant circumstance but it did not explain the reason in detail. The Tribunal was aware of the problems posed by the relationship in that maritime area of the continental shelf and EEZ rights, however, it found no need to deal with it in this case (para.368).

[408] In delimiting territorial sea, the Tribunal found that there was no historic title and geographical feature that justify for the adjustment of the maritime boundary (para.297). In delimiting the EEZ and continental shelf, the Tribunal took the view that the relevant coastlines did "not present any marked concavity or convexity." Therefore, after careful examination, the Tribunal concluded that "the geographical configuration of the relevant coastlines does not represent a circumstance that would justify any adjustment or shifting of the provisional equidistance line in order to achieve equitable solution." In addition, with regard to the conduct of the parties, the Tribunal supported the conclusions of other awards and judgments in the *St-pierre et Miquelon, Lybia/Malta, Cameroon v. Nigeria* and *Barbados v. Trinidad and Tobago* that 1 concession and oil wells are generally not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provisional delimitation line and thus the oil practice of the parties cannot be taken into account int he maritime delimitaiton of the martime boundary in this case (paras.386-91, 2007 Award).

[409] *Barbados v. Trinidad and Tobago*, 2006 Award, para.233.

shows the movement towards a more predictable and certain set of law concerning maritime delimitation.

2.3. The use of single or multiple maritime boundaries

Also concerning maritime delimitation, the issue of single, multiple or separate maritime boundaries is a complicated issue which has not been clearly dealt with in the case law so far.[410] The judgement in the *Libya/Malta* case,[411] reaffirmed by the *Barbados v. Trinidad and Tobago,*[412] confirmed that both the EEZ and the continental shelf coexisted from the fact that within 200 nautical miles from a state's baselines distance was the basis for the entitlement to each of them. If the parties ask for a common boundary both of the EEZ and continental shelf that is what they will get.[413] However, the Court has also confirmed that there is no rule to decline the possibilities of either single or multiple lines.[414] In fact, the using of separate maritime boundaries is complicated because of technical problem of different jurisdictions in the seabed and the water column above in delimitation and implementation. The continental shelf regime gives coastal state sovereign rights over the seabed and subsoil only. However, in order to exploit the shelf, the coastal states requires access to the super-adjacent

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[410] Although the Court arrived at a single maritime boundary, it did not clarify that is the law. In some cases, the results were just based on the wishes of the parties, for example, in the *Gulf of Maine* and the *Libya/Malta* cases. In the others, the Court just arrived at single boundary but presented no explanation as to why such single maritime boundary was adopted. They are the *Eritrea/ Yemen Award*, the *Qatar v. Bahrain* and the *Cameroon v. Nigeria* cases. Most recently, the Tribunal in *Barbados v. Trinidad and Tobago* had a chance to deal with the issue, but it tried to avoid by the argument that the parties had already agreed with single maritime boundary in delimitation of the first two segments, and thus it was not necessary to examine the other possibility in the last segment.

[411] *Continental Shelf (Libyan Arab Jamahiriya v. Malta), Judgment*, ICJ Reports (1985), p.13.

[412] *Barbados v. Trinidad and Tobago Arbitration Award*, 2006, para.226.

[413] M D. Evans, "Delimitation and the Common Maritime Boundary" (1993) 64 *BYIL* 283, at 329.

[414] In the *Gulf of Maine* case, the Court noted that it might only imply that there were certainly no rule to the contrary in respect of single line, but there was no material impossibility to multiple boundaries either (*The Gulf of Maine* case, ICJ Report, 1984, para.27 and Attard, *The Exclusive Economic Zone in International Law*, (Oxford: Clarendon Press, 1987), p.219). Furthermore, in the *Guinea-Bissau/Senegal* case, Judge Weeramantry shows that if one holds the view that the various regimes are conceptually distinct, then logically, the boundaries are themselves to be considered as conceptually distinct. He accepts the practical advantages in having common line, but sees this as flowing not from any trend or doctrinal necessity, or even desirability, but simply from the decision of the parties to seek a single line. However, as with the Chamber in the *Gulf of Maine* case, he did not consider whether it is permissible to ask the Court to undertake such an exercise in the first place (The *Guinea-Bissau/Senegal Maritime Delimitation Arbitration Award* (1989), reported in (1992) 31 *ILM* p.36 and The opinion of Judge Weeramantry is at p.168-173, quoted in Evans, *op.cit.*, note 413, p.319). Tunisia, on the other hand, support single boundary by the argument that "given that the coastal state, under Article 56 of the draft Convention, possesses, in the EEZ, sovereign rights for the purpose of exploring and exploiting the natural resources of the seabed and its subsoil, it is difficult to conceive how the limits of the EEZ could differ from those of the continental shelf inside the 200 miles" (Quoted in Dissenting opinion of Judge Oda in *Tunisia v. Libya*, ICJ Report, 1982, p.157 at 232).

water column.[415] The specific geology makes the use of multiple boundaries difficult causing the technical problems in implementation when the water column and the seabed belong to different jurisdictions. This gives rise to the application of the majority case law and state practice to single and common maritime boundaries.

Notwithstanding, state practice shows that delimiting single or common maritime boundaries is still not recognised as the only method for maritime delimitation of the EEZ and continental shelf. Some states still use separate maritime boundaries in their delimitation. For example, in the 1978 Torres Strait Treaty between Australia and Papua New Guinea,[416] the boundaries for the fisheries and seabed in the central area of Torres Strait are diverged. The seabed line follows a modified median line between the mainlands of the two countries, whereas the fisheries jurisdiction turns sharply to the north, to enclose some inhabited islands of Australia and then abruptly turns south to rejoin the seabed line.[417] Another example of separate maritime boundaries can be found in the Maritime Delimitation Treaty between Indonesia and Australia in 1997, in which Article 7 provides that EEZ sovereignty rights and jurisdiction are limited to the water column, and that continental shelf sovereignty rights and jurisdiction are applicable to the seabed.[418] Furthermore, some states also endorse the separatist approach to the relationship between the EEZ and continental shelf and imply that separate lines might be used for their delimitation by the stipulation of their national legislation.[419]

Separate maritime boundaries are also justifiable in cases where the continental shelf and the EEZ have different outer edges, i.e. when the coastal state is eligible to apply Article 76 in which the maximum breadth of the continental shelf may be extended beyond 200 nautical miles. In this case, beyond 200 nautical miles, the maritime boundary is only delimited for the continental shelf and the water above this area is not the EEZ of the states concerned.[420] The

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[415] Stuart Kaye, "The Use of Multiple Boundaries in Maritime Boundary Delimitation: Law and Practice" (1998) 49 *AYIL* 49, at 61, Attard, *ibid*, at 216-7.

[416] For full text of the Agreement, see http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-PNG1978TS.PDF (accessed on 30 April 2006).

[417] For further discussion, see Stuart Kaye, *op.cit.*, note 415, at p.65-72.

[418] For full text of the Agreement, see http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-IDN1997EEZ.pdf (accessed on 30 April 2006).

[419] For example, Bulgaria (Act of 8 July 1987 OSR CDII, p.3), Indonesia (Act No.5 on Indonesian EEZ, 18 October 1983 OSR CD I, p.103) and Vanuatu (Maritime Zones Act No.23 of 1981 OSR CDII, p.124) (Statistics provided by M D. Evans, "Delimitation and the Common Maritime Boundary" (1993) 64 *BYIL* 283-332 at 297).

[420] Prosper Weil, *The Law of Maritime Delimitation- Reflections* (Cambridge: Grotius Publications Limited, 1989), p.134.

separate maritime boundary may also be accepted in delimiting continental shelf and fishery zones as different regimes to the EEZ. Within fishery zones coastal states only have sovereign rights towards fisheries, e.g. the delimitation in the Torres Strait Treaty. Therefore, although it is more practical to achieve a single boundary, the law of maritime delimitation does not rule out the possibility of delimiting separate boundaries for continental shelf and fishery zones and for the EEZ and continental shelf beyond 200 nautical miles. The application will very much depend on the choice of the parties.

3. Maritime claims of the parties in the South China Sea dispute

The maritime claims of the parties in the South China Sea dispute can be divided into two groups. China and Taiwan are so far away that their maritime zone generated from the mainland will not have any overlapping with the Spratlys' water.[421] However, these two parties make a historic claim which covers almost all of the South China Sea. Other states, namely Brunei, Malaysia, the Philippines and Vietnam, due to their closer distance to the Spratlys may have overlapping between the maritime zones of their mainland with those of the Spratlys (with the hypothesis that the Spratlys belong to different jurisdictions). So far, except the Philippines, the littoral states have not made any official maritime claims. Therefore, this part will primarily examine the maritime claims generated from the mainland of Brunei, Malaysia, the Philippines and Vietnam. Then it will analyse the historic maritime claims of China and Taiwan.

3.1. Maritime claims of coastal states

3.1.1. Claims regarding baselines

The starting point of maritime delimitation is the entitlement of a state to a given maritime area and within 200 nautical miles from a state's baselines distance is the basis for the entitlement to the parties concerned, i.e. baselines are also play an important role in identifying the entitlement of the parties to a dispute. Of all the parties concerned, Vietnam, China, Taiwan and the Philippines laid down their claims regarding baselines. However, since the mainlands of China and Taiwan are too far away from the Spratlys, their claims regarding baselines from their mainlands will not affect the maritime delimitation of the

[421] Due to the large distance from China and Taiwan (see Figure 33, *infra*), even in the case of natural prolongation, the continental shelf of China and Taiwan will not produce any overlapping with those of the Spratlys.

Spratlys' water. Hence this section will only focus on the baselines claimed by Vietnam and the Philippines.

Vietnam declared straight baselines, in the Statement of 12 November 1982, through 11 basepoints from the South to the North along the coastline.[422] Almost all parts of the baselines will relate to the South China Sea maritime delimitation except two parts, namely the part in the Gulf of Tokin and the Western part, near the Gulf of Thailand. The entire baseline forms in a shape of a semicircle with six major lines which can be seen in Figure 22 as follows:

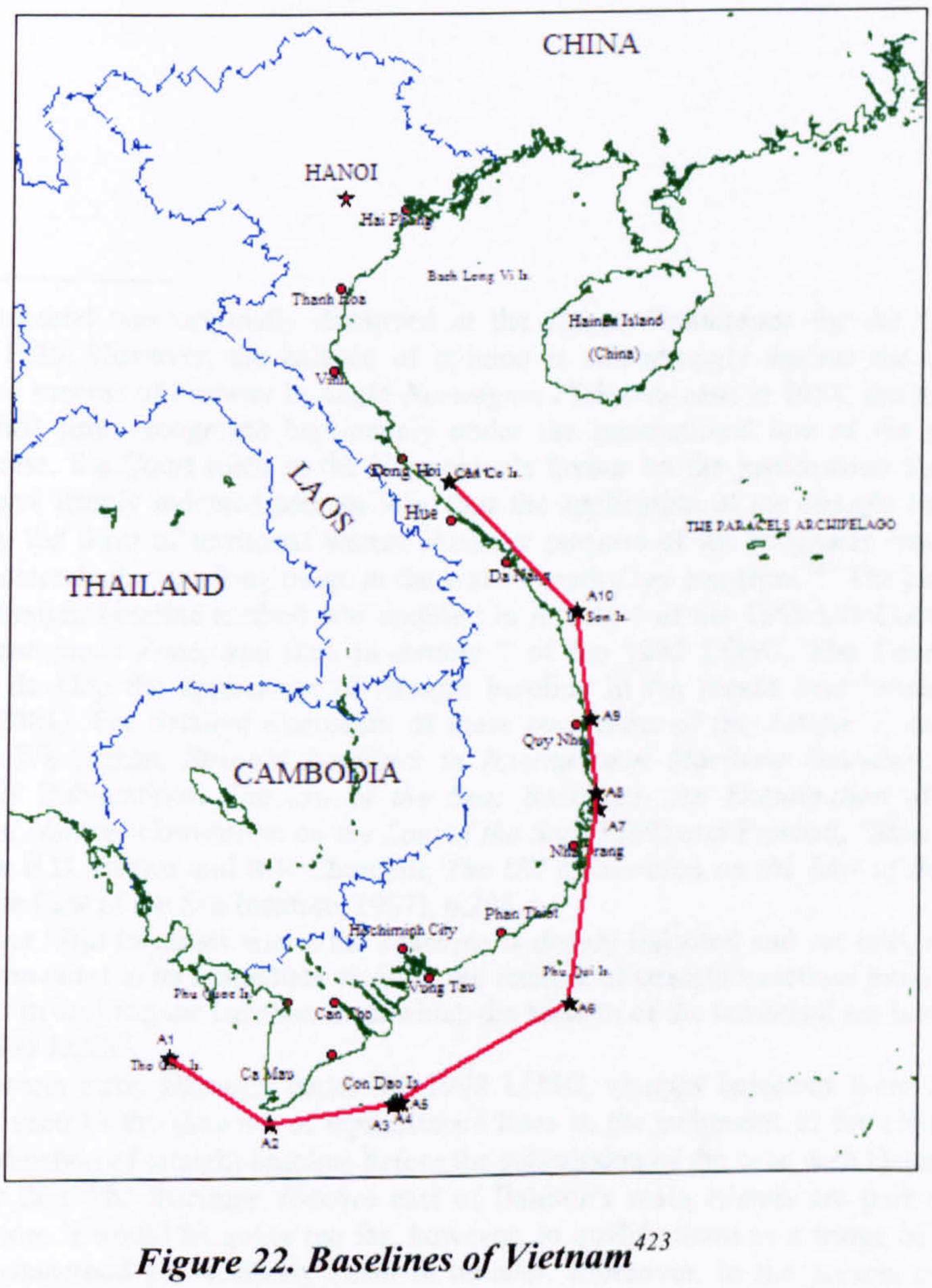

Figure 22. Baselines of Vietnam[423]

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[422] For full text of the statement, see http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1982_Statement.pdf (accessed on 13 April 2006).

[423] Map drawn by Mapinfo.

The baselines of Vietnam is criticised of violating Article 7 of the 1982 LOSC.[424] Accordingly, the straight baselines are applicable where the coasts which are "deeply indented and cut into" and have "the presence of a fringe of islands" along them.[425] The straight baselines are also required not to "depart any appreciable extent from the general direction of the coast" and "sufficiently closed link to the land domain".[426] Although some parts of claimed baseline may be legitimate, e.g. from basepoints A8 to A7 and partly from A7 to A6 since they are applied to the area where the Vietnamese coasts are "cutting into", other parts are departed from the general direction of the Vietnamese coast, particularly from basepoints A2 to A7. Therefore, the claim of Vietnam regarding baselines is not completely legitimate and may not be used as the basis for entitlement of the mainland of Vietnam.[427]

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[424] Straight baseline method was originally discussed at the Hague Conference for the Codification of International Law in 1930. However, the balance of opinion is still strongly against the use of straight baseline. Then, with the success of Norway in *Anglo-Norwegian Fisheries* case in 1951, the straight baseline method was for the first time recognised legitimately under the international law of the sea. In *Anglo-Norwegian Fisheries* case, the Court ruled in the Norwegian's favour on the justification that the coast of Norway was *skjaergaard,* deeply indented and cut into, thus the application of the straight baseline method would help to simplify the form of territorial waters. Another purpose of the judgment was to secure the Norwegian economic interests through long usage in the waters nearby her coastline.[424] The judgment of the Fisheries case on the straight baseline method was codified in Article 4 of the 1958 UN Convention on the Territorial Sea and Contiguous Zone, and then in Article 7 of the 1982 LOSC. The Court also had an opportunity to further develop the application of straight baseline in the recent case between Qatar and Bahrain (ICJ Report, 2001). For detailed discussion of these conditions of the Article 7, see W. Michael Reisman and Gayl S. Westerman, *Straight Baselines in International Maritime Boundary Delimitation,* (Macmillan, 1992); UN Publications, *The law of the Sea: Baselines- An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1989) and Prescott, "Straight Baselines: Theory and Practice" in E.D. Brown and R.R Churchill, *The UN Convention on the Law of the Sea: Impact and Implementation* (The Law of the Sea Institute, 1987), p.288.

[425] Article 7 provides that "[i]n localities where the coastline is deeply indented and cut into, or if there is a fringe of islands along the coast in its immediate vicinity, the method of straight baselines joining appropriate points may be employed in drawing the baseline from which the breadth of the territorial sea is measured".

[426] Article 7(3) of the 1982 LOSC.

[427] In the *Qatar v. Bahrain case*, although under the 1982 LOSC, straight baselines were applicable for Bahrain, they were not used in the drawing of equidistance lines in the judgment of the Court as Bahrain failed to declare the application of straight baseline before the submission of the case with Qatar. In this case, the Court did not deny that "the maritime features east of Bahrain's main islands are part of the overall geographical configuration; it would be going too far, however, to qualify them as a fringe of islands along the coast. The islands concerned are relatively small in number. Moreover, in the present case it is only possible to speak of a "cluster of islands" or an "island system" if Bahrain's main islands are included in that concept. In such a situation, the method of straight baselines is applicable only if the State has declared itself to be an archipelagic State under Part IV of the 1982 Convention on the Law of the Sea, which is not true of Bahrain in this case." Therefore, Bahrain was not entitled to apply the straight baseline in drawing of equidistance lines (ICJ Report, 2001, p.40 at paras.214-5).

The Philippines defined their baselines in the Republic Act No.3046 of 17 June 1961 and then amended in the Republic Act No. 5446 of 18 September 1968.[428] The Philippines, due to their archipelagic state status, are entitled to apply archipelagic baselines. Under the Republic Act of 1968, the archipelagic baselines of the Philippines were defined by 80 straight baselines. Details of the baselines will be illustrated in Figure 23 as follows:

Figure 23. Baselines of the Philippines[429]

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[428] For full text of the Acts, see http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1961_Act.pdf and http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1968_Act.pdf (accessed on 13 April 2006).

[429] Sources: United Nations, *The Law of the Sea: Baselines: National Legislation with Illustrative Maps,* (Office for Ocean Affairs and the Law of the Sea, 1989), p.259.

Among many segments of the archipelagic baselines of the Philippines, only the Western part is related to the maritime delimitation of the South China Sea. The application of the archipelagic baselines of the Philippines in these segments is lawful[430] and may be used in maritime delimitation in the South China Sea. Thus, all the basepoints in the Western segments may be used for defining the equidistance line.

In addition to the archipelagic baselines, the Philippines also claims the "baselines" for their claimed features of the Spratlys. The Presidential Decree No. 1596 of June 1978 of the Philippines declared an area

> [f]rom a point [on the Philippine Treaty Limits] at latitude 7°40' North and longitude 116°00' East of Greenwich, thence due and West along the parallel of 7°40' N to its intersection with the meridian of longitude 112°11' E, thence due north along the meridian of 112°10' E, to its intersection within the parallel of 9°00' N, thence northeastward to the intersection of the parallel of 12°00' N to its intersection with the meridian of longitude 114°30' E, thence, due East along the parallel of 12°00' N to its intersection with the meridian of 118°00' E, thence, due South along the meridian of longitude 118°00' E to its intersection with the parallel of 10°00' N, thence Southeastwards to the point of the beginning at 7°40' N, latitude and 116°00' E longitude

as part of the Philippine territory on the basis of proximity, security and *terra nullius*. This area is illustrated in Figure 24 below.

From the earlier analysis in Chapter 2, even if the Philippines successes with its sovereignty claim over the Spraltys, it will be unable to use the Spratlys' features as basepoints for their archipelagic baselines.[431] Therefore, such maritime area for the Spratlys under the Decree No.1956 is claimed on the groundless basis of international law regardless the legality of the sovereignty claim of the Philippines.

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[430] International law regarding archipelagic baselines stipulates, at Article 47(1) of the 1982 LOSC, that "[a]n archipelagic State may draw straight archipelagic baselines joining the outermost points of the outermost islands and drying reefs of the archipelago provided that within such baselines are included the main islands and an area in which the ratio of the area of the water to the area of the land, including atolls, is between 1 to 1 and 9 to 1". Besides the conditions of being the outermost islands and drying reefs of the archipelago, Article 47(4) of the 1982 LOSC further provides that the basepoints of archipelagic baselines may also draw from the low tide elevation provide that "lighthouses or similar installations which are permanently above sea level have been built on them or where a low-tide elevation is situated wholly or partly at a distance not exceeding the breadth of the territorial sea form the nearest island".

[431] See *supra*, Chapter 2, Section 5.1.

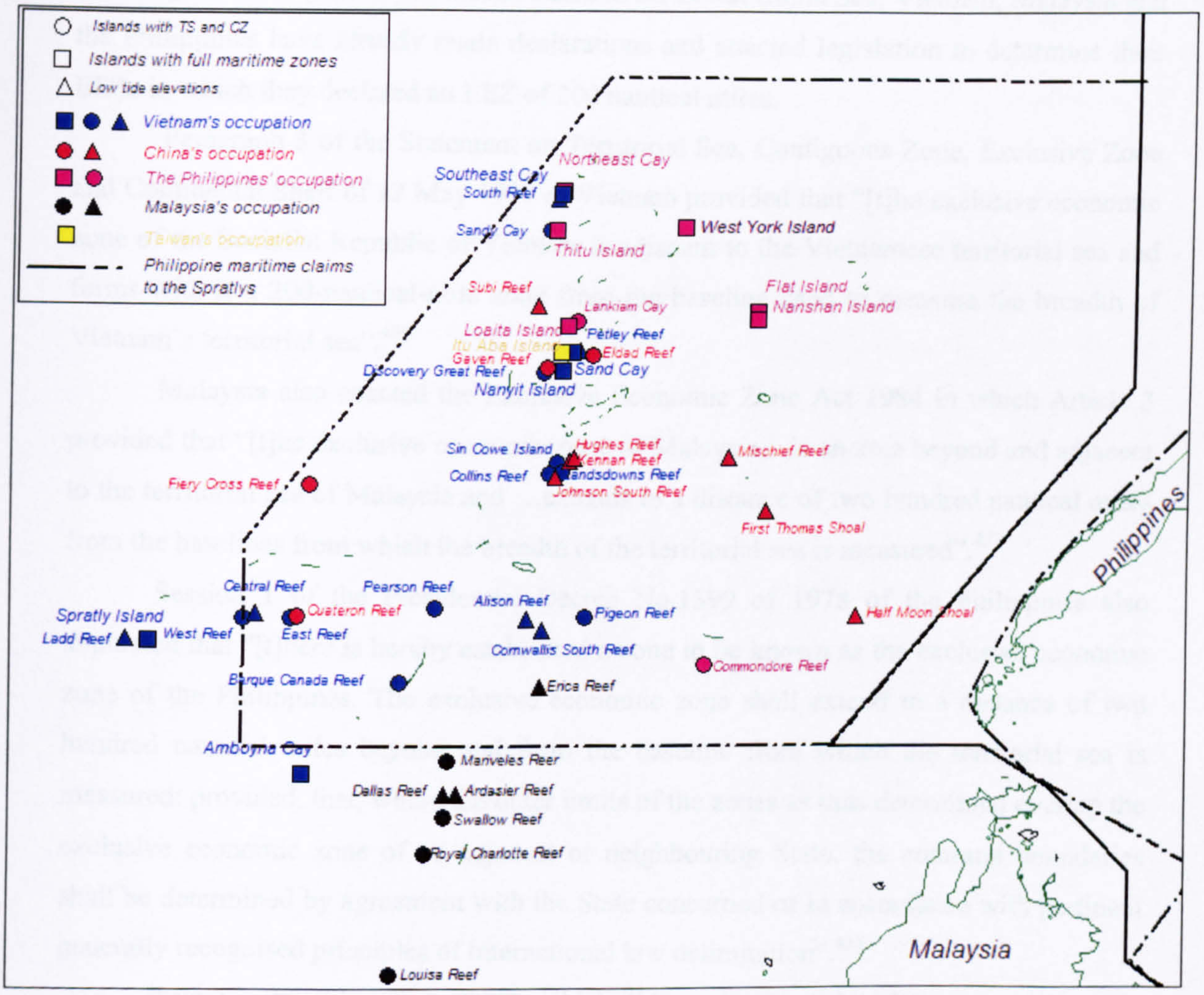

Figure 24. Maritime claims of the Philippines over the Spratlys[432]

3.1.2. The EEZ

The EEZ is an area beyond and adjacent to the territorial sea where the coastal states have sovereignty rights of management and control of virtually all economically oriented activities.[433] The breadth of the EEZ is determined by Article 57 of the 1982 LOSC and "shall not extend beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured". However, these rights do not exist *ipso facto* and *ab initio* as different from the continental shelf, the Convention is silent in indicating that the rights of coastal states in the EEZ do not depend either on occupation or on any express

[432] Map drawn by Mapinfo.
[433] Details of the rights and duties of the coastal states are stipulated in Article 56 of the LOSC.

proclamation.[434] A number of writings on this issue agree that the EEZ must be declared.[435] With regard to the practice of coastal states in the South China Sea, Vietnam, Malaysia and the Philippines have already made declarations and enacted legislation to determine their EEZs in which they declared an EEZ of 200 nautical miles.

Paragraph 3 of the Statement on Territorial Sea, Contiguous Zone, Exclusive Zone and Continental Shelf of 12 May 1977 of Vietnam provided that "[t]he exclusive economic zone of the Socialist Republic of Vietnam is adjacent to the Vietnamese territorial sea and forms with it a 200-nautical-mile zone from the baseline used to measure the breadth of Vietnam's territorial sea".[436]

Malaysia also enacted the Exclusive Economic Zone Act 1984 in which Article 3 provided that "[t]he exclusive economic zone of Malaysia…is an area beyond and adjacent to the territorial sea of Malaysia and …extends to a distance of two hundred nautical miles from the baselines from which the breadth of the territorial sea is measured".[437]

Session 1 of the Presidential Decree No.1599 of 1978 of the Philippines also stipulated that "[t]here is hereby established a zone to be known as the exclusive economic zone of the Philippines. The exclusive economic zone shall extend to a distance of two hundred nautical miles beyond and from the baseline from which the territorial sea is measured: provided, that, where the outer limits of the zones as thus determined overlap the exclusive economic zone of an adjacent or neighbouring State, the common boundaries shall be determined by agreement with the State concerned or in accordance with pertinent generally recognised principles of international law delimitation".[438]

Brunei is the only adjacent state which did not enact any legislation concerning the exclusive economic zone. However, it declared a 200 nautical miles fishery under the 1984 Fishery Limit Act.[439]

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[434] Similar to Article 77(3) of LOSC on the continental shelf.
[435] Attard, *The EEZ in the Law of the Sea Convention* (Oxford: Clarendon Press, 1987), p.58.
[436] For full text of the Statement, see http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/VNM_1977_Statement.pdf (accessed on 8 April 2005).
[437] For full text of the Act, see http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1984_Act.pdf (accessed on 8 April 2005).
[438] For full text, see http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1978_Decree.pdf (accessed on 8 April 2005).
[439] This Act was amended in 2002. Source: The Brunei Fishery Department at http://www.fisheries.gov.bn/home.htm (accessed on 14 March 2006).

These 200 nautical miles EEZs and fishing zone of the four states will be estimated as follows:

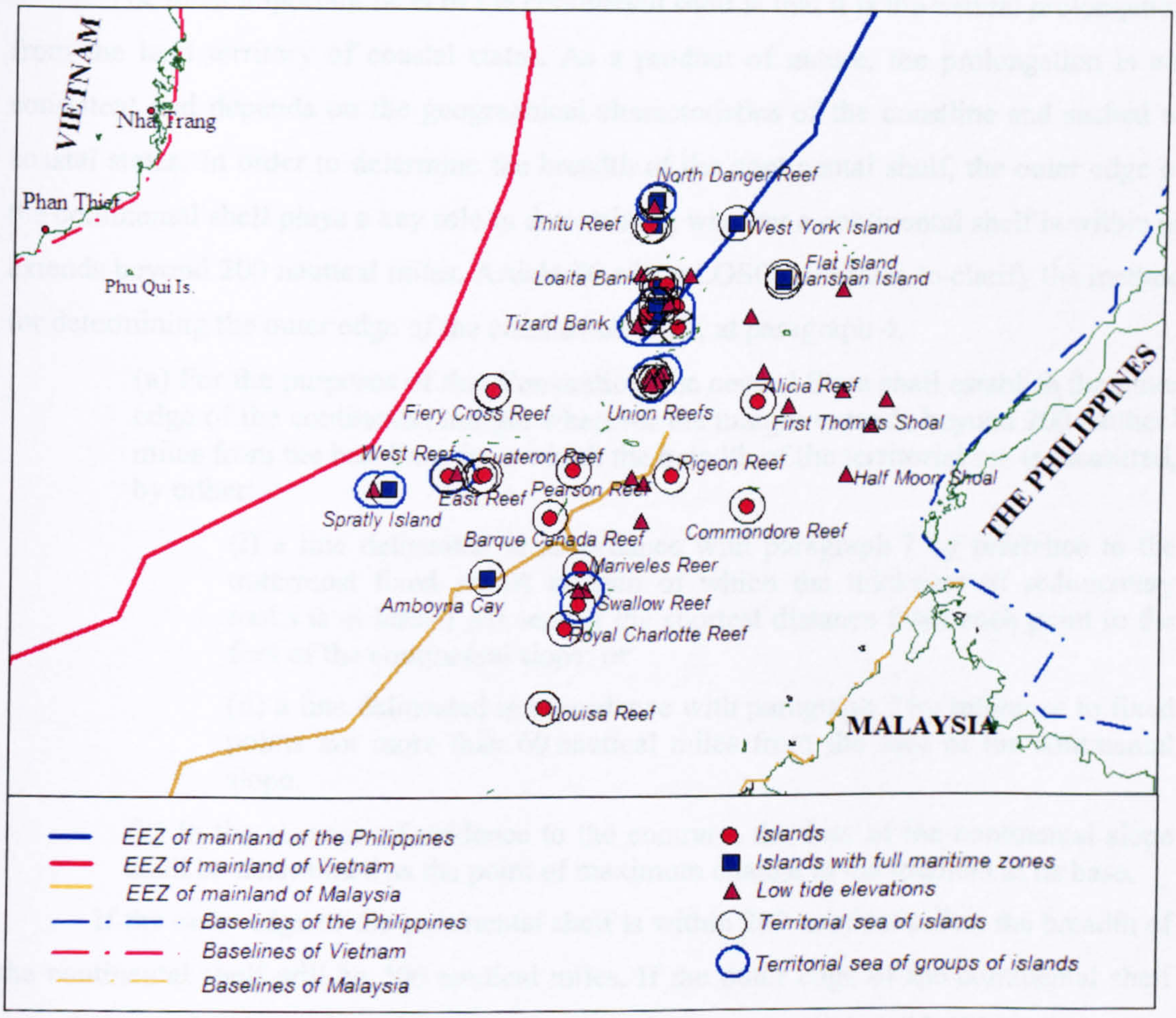

Figure 25. EEZs of Vietnam, Malaysia, Brunei and the Philippine in the adjacent water to the Spratlys[440]

3.1.3. The continental shelf

The continental shelf of a coastal state under Article 76 of the 1982 LOSC is defined as comprising:

> the sea-bed and subsoil of the submarine areas that extend beyond its territorial sea throughout the natural prolongation of its land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baselines from which the breadth of the territorial sea is measured where the outer edge of the continental margin does not extend up to that distance.
>
> ...

[440] Map drawn by Mapinfo.

> The continental margin comprises the submerged prolongation of the land mass of the coastal State, and consists of the seabed and subsoil of the shelf, the slope and the rise. It does not include the deep ocean floor with its oceanic ridges or the subsoil thereof.[441]

The most important facet of the continental shelf is that it is the natural prolongation from the land territory of coastal states. As a product of nature, the prolongation is not consistent and depends on the geographical characteristics of the coastline and seabed of coastal states. In order to determine the breadth of the continental shelf, the outer edge of the continental shelf plays a key role in determining whether a continental shelf is within or extends beyond 200 nautical miles. Article 76 of the LOSC continues to clarify the method for determining the outer edge of the continental shelf, at paragraph 4.

> (a) For the purposes of this Convention, the coastal State shall establish the outer edge of the continental margin wherever the margin extends beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured, by either:
>
> (i) a line delineated in accordance with paragraph 7 by reference to the outermost fixed points at each of which the thickness of sedimentary rocks is at least 1 per cent of the shortest distance from such point to the foot of the continental slope; or
>
> (ii) a line delineated in accordance with paragraph 7 by reference to fixed points not more than 60 nautical miles from the foot of the continental slope.
>
> (b) In the absence of evidence to the contrary, the foot of the continental slope shall be determined as the point of maximum change in the gradient at its base.

If the outer edge of the continental shelf is within 200 nautical miles, the breadth of the continental shelf will be 200 nautical miles. If the outer edge of the continental shelf extends beyond 200 nautical miles, the breadth of the continental shelf will be limited by two criteria set out in paragraph 5, namely (i) 350 nautical miles from the baselines from which the breadth of the territorial sea is measured and (ii) 100 nautical miles from the 2,500 metre isobath, which is a line connecting the depth of 2,500 metres. However, in any case, the breadth of the continental shelf shall not exceed 350 nm from the baselines.[442]

The rights of a coastal state towards the continental shelf exist *ipso facto* and *ab initio,* by virtue of its sovereignty over the land. If the coastal state does not explore the continental shelf or exploit its natural resources, no one can undertake these activities

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[441] Article 76(1) and (3).
[442] Article 76(6) of the LOSC.

without the express consent of the coastal state. The rights of the coastal state over the continental shelf do not depend on occupation, effective or notional, or any express proclamation.[443] However, the chart and relevant information, including geodetic data, permanently describing the outer limits of the continental shelf must be deposited with the Secretary General of the UN.[444] In addition, in cases where the limits of the continental shelf exceed 200 nautical miles, the coastal states have to submit the information related to the delineation to the Commission on the Limits of the Continental Shelf.[445]

Of the four coastal states of the South China Sea region under current examination, Vietnam, Malaysia and the Philippines have made declarations and enacted legislation regarding their continental shelves. Vietnam stated that

> [t]he continental shelf of the Socialist Republic of Vietnam comprises the seabed and subsoil of the submarine areas that extend beyond the Vietnamese territorial sea throughout the natural prolongation of the Vietnamese land territory to the outer edge of the continental margin, or to a distance of 200 nautical miles from the baseline used to measure the breadth of the Vietnamese territorial sea where the outer edge of the continental margin does not extend up to that distance.[446]

The Philippines, by a proclamation of their president, No.370 in 1968, also claimed all the mineral and other natural resources in the seabed of their continental shelves. The proclamation did not apply the method of Article 76 of the LOSC but used the "depth of the superadjacent waters admits of the exploitation" of natural resources to measure the breadth of the continental shelf.[447] In a similar approach to the Philippines, Malaysia defined that

> "continental shelf" means the sea-bed and subsoil of submarine areas adjacent to the coast of Malaysia but beyond the limits of the territorial waters of the States, the surface of which lies at a depth no greater than two hundred metres below the surface of the sea, or, where the depth of the superadjacent water admits of the exploitation of the natural resources of the said areas, at any greater depth.[448]

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[443] Article 77 of the LOSC.
[444] Articles 76(9) and 84 of the LOSC.
[445] Article 76(8) of the LOSC. For details of the procedure for coastal state to establish the outer limit of the Continental Shelf, see the Annex II of 1982 LOSC. For analysis, see Robert W. Smith and George Taft, "Legal Aspects of the Continental Shelf" in Peter J. Cook and Chris M. Carleton (ed.), *Continental Shelf Limits: The Scientific and Legal Interface,* (Oxford: Oxford University Press, 2000), p.17 at 20-24.
[446] Paragraph 4 of the Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Economic Zone and the Continental Shelf of 12 May 1977, *op.cit.*, note 436.
[447] Presidential Proclamation No.370 of 20 March 1968 Declaring as Subject to the Jurisdiction and control of the Republic of the Philippines all Mineral and other Natural Resources in the Continental Shelf, for full text, see http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1968_Proclamation.pdf (accessed on 8 April 2005).
[448] Article 2 of the Continental Shelf Act 1966 of Malaysia, for full text, see

The stipulations of the Philippines and Malaysia rely on the 1958 Convention on the Continental Shelf. These out of date stipulations can be justified because their legislation was enacted long before the 1982 LOSC came into effect.[449] Brunei, although it has not enacted any legislation regarding its continental shelf, reportedly printed a map defining its fishery and continental shelf limits in 1988.

Although the details of the delineation of the continental shelves are not available from the legislation of the states concerned, based on the geographical characteristics of the seabed in the South China Sea, predictions as to the breadth of their continental shelves can be made. For the Philippines, due to the presence of the deep Palawan Trough which separates the Spratlys from the Philippines archipelagos, the outer edge of the continental shelf of the Philippines, in the coastal area adjacent to the Spratlys, is likely to be within 200 nautical miles, and thus their continental shelf may be measured by 200 nautical miles. This situation is opposite in the case of Southeast Vietnam and the Northwest of the Sarawak of Malaysia. Within these areas, the outer edge of the continental shelves likely extends beyond 200 nautical miles, and thus these countries may have continental shelf beyond 200 nautical miles. However, in order to delineate that outer limit, these countries need to decide the methodologies to be applied according to Article 76(4) and submit the information concerning the outer limits to the Commission on the Limits of the Continental Shelf. The limits of the shelf established by a coastal state on the basis of the recommendation of the Commission will be final and binding.[450] At the moment, Vietnam and Malaysia have not submitted the information related to their continental shelf limits. However, in the maximum cases where the outer limits of some parts of the continental shelf of Vietnam and Malaysia can extend to 350 nautical miles or 100 nautical miles from the 2,500 metre isobath, it likely has limited effect on the maritime spaces of the Spratlys as these areas are further south in the Gulf of Thailand. The outer limits of the coastal states can be estimated on a map as follows:

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http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/MYS_1966_Act.pdf (accessed on 8 April 2005).

[449] Although currently they are parties to the 1982 LOSC, they have not made changes to comply with the Convention.

[450] Article 76(8) of the 1982 LOSC.

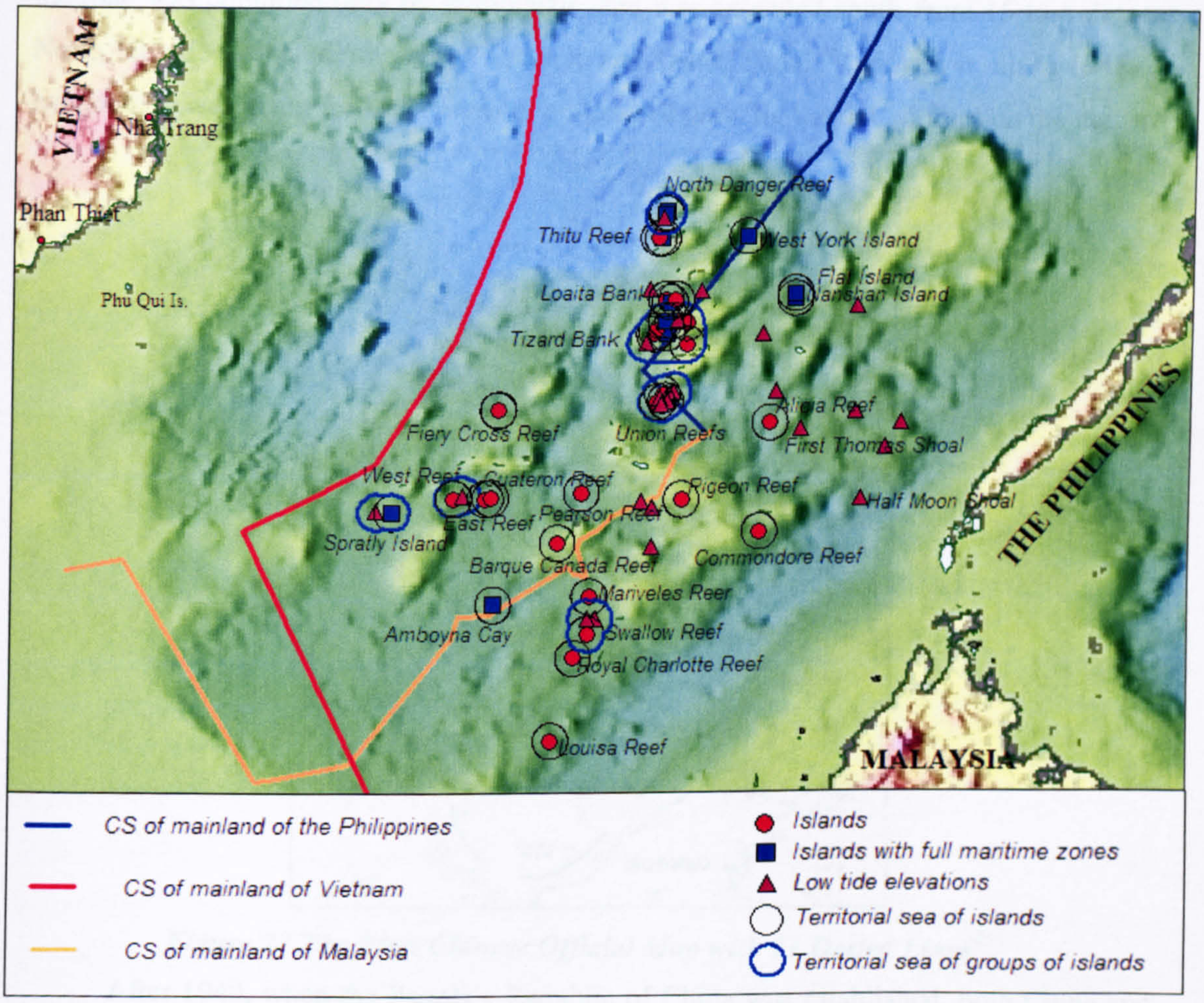

Figure 26. Continental shelves of Vietnam, Malaysia, Brunei and the Philippine in the adjacent water to the Spratlys[451]

3.2. Historic maritime claims of China and Taiwan

Unlike Vietnam, Malaysia, the Philippines and Brunei, the maritime zones from the mainland of China and Taiwan will not have any effect on the waters of the Spratlys as the distance from the Spratlys to mainland China and Taiwan is too far.[452] However, China and Taiwan lodge another historic maritime claim. In 1947, the Government of the Republic of China published a map which contained 11 dotted lines in the South China Sea. This map was later included in the Atlas of Administrative Areas of the Republic of China in 1948.[453]

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[451] Map drawn by Mapinfo.
[452] For concrete distance, see Chapter 1, *sufra* and Figure 33, *infra*.
[453] Zou Keyuan, "The Chinese Traditional Maritime Boundary Line in the South China Sea and its Legal Consequences for the Resolution of the Dispute over the Spratly Islands" (1999) 14(1) *IJMCL*, p.27 at 33.

This was the official confirmation of the Government of China to the map, as before 1947 the map was compiled only by individuals, and was extended south from 15 to 4 degrees North latitude to include the entire Spratlys and James Shoal.[454] However, up to 1948, no explanation was given for the reasons or purpose of drawing the dotted lines on the map.

Figure 27.The First Chinese Official Map with 11 Dotted Lines[455]

After 1949, when the People's Republic of China was established, both China and Taiwan claimed to represent the entirety of China and succeeded to the map. China and Taiwan interpreted the meaning of the dotted lines differently. Taiwan considered the dotted lines as the boundary for its historic water in the South China Sea. In 1993, the Taiwan Government adopted new South China Sea Policy Guidelines which said "the South China Sea area within the historic water limit is the maritime area under the jurisdiction of the Republic of China".[456] In 1997, the Draft of the Territorial Sea Law mentioned that the "ROC's historic waters and its area shall be promulgated by the

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[454] The earliest compiled map was found in 1914. For details of the origin and evolution of the map, see Zou Keyuan, *ibid,* p.32-34 and Li Jinming and Li Dexia, "The Dotted Line on the Chinese Map of the South China Sea: A Note" (2003) 34 *ODIL,* p.287 at 287-90.

[455] Zou Keyuan, *op.cit.,* note 453, p.29.

[456] Quoted in Kuan-Ming Sun, "The Policy of the Republic of China Towards the South China Sea" (1995) 19(5) *Marine Policy,* p.401 at 430.

Executive Yuan".[457] Although these wordings were dropped from the final text of the Law, Taiwan made an official statement that the dropping of such wording was not an abandonment of the official position of Taiwan that the water areas within the lines were historic waters of China.[458]

China, on the other hand, has not made any official explanation of the lines. During the 1960s, China removed two segments in the Gulf of Tokin to keep nine segments left in the dotted line. Other Chinese legislation on the law of the sea, e.g. the 1958 Declaration on the Territorial Sea and the amended Declaration on the Territorial Sea in 1992 did not mention the lines. However, in practice, China claims sovereignty over both the Paracels and Spratlys and exercises her rights in maritime spaces in many areas of the South China Sea. Granting a concession to the Crestone Energy Corporation to exploit oil in an area between the Vanguard Bank and the Prince of Wales Bank, 160 nautical miles off the Vietnamese coast, showed China's exercising her rights in maritime spaces and implied China's maritime claims.

Due to China's ambiguity in explaining the significance of the dotted line, there are three different assumptions made as to the significance of the line. The first assumption is that the line shows the territorial claims of China to the islands within the line.[459] This means that the dotted line is only used to illustrate the territorial claims of China to islands in the South China Sea including the Paracels and the Spratlys. In this case, the question of sovereignty claims of China was discussed earlier in this thesis.[460] The second assumption is that China regards the line as her maritime boundary line.[461] If the line is regarded as a maritime boundary, it may be relied upon two bases: (i) the water within the line is considered as the maritime zones of the Paracels and Spratlys and the line is the meridian line of these zones and the maritime spaces of other states and (ii) similar to the interpretation of Taiwan, the water within the line is the historic water. For the first basis, the legitimacy of the line will be dependent on the sovereignty issues which were discussed

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[457] Quoted in Cheng-yi Lin, "Taiwan's South China Sea Policy" (1997) 37(4) *Asian Survey*, p.323 at 325.
[458] Zou Keyuan, *op.cit.*, note 453, p.37.
[459] This is the opinion of some Chinese scholars quoted in Cheng-yi Lin, *op.cit.*, note 457, p.291.
[460] See *supra*, Chapter 3.
[461] For the argument for this assumption, see Zou Keyuan, *op.cit.*, note 453, p.52.

elsewhere.[462] On the second basis, China and Taiwan share the same claim of historic waters.

Historic waters together with historic bay, under international law of the sea, are a subject of controversy. Some scholars have tried to suggest a definition of historic water. For example, Blum defines that "the term 'historic water' is applied nowadays in respect of maritime areas in general, with the reference to bodies of water which – in spite of their being situated beyond the normal limits of a State's maritime domain- are treated as if they were part of the maritime appurtenance of the littoral State".[463] Bouchez offers another definition that "[h]istoric waters are waters over which the coastal State, contrary to the generally applicable rules of international law, clearly, effectively, continuously, and over a substantial period of time, exercises sovereignty rights with the acquiescence of the community of States".[464] D.P. O'Connell also lays out three circumstances which could be considered as historic water: "(1) bays claimed by states which are greater in extent, or less in configuration, than standard bays; (2) areas of claimed waters linked to a coast by offshore features but which are not enclosed under the standard rules and (3) areas of claimed seas which would, but for the claim, be high seas because not covered by any rules specially concerned with bays or the delimitation of coastal waters (*maria clausa*)".[465]

In the *Fisheries* case, the Court clarified that "historic waters are usually meant waters which are treated as internal waters but which would not have that character were it not for the existence of an historic title".[466] Furthermore, under the studies of the UN Secretariat in 1962, as requested by the UN International Law Commission, the common perception on historic water was described thus:

> The State which claims 'historic waters' in effect claims a maritime area which, according to general international law, belongs to the high seas. As the high seas are *res communis omnium* and not *res nullius,* title to the area cannot be obtained by occupation. The acquisition by historic title is 'adverse acquisition,' akin to acquisition by prescription; in other words, title to 'historic water' is obtained by

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[462] If the argument is that the water within the dotted line is the maritime spaces generated from the Paracels and Spratlys, China can only claim these maritime zones once it has lawful title to both the Paracels and Spratlys. This issue was discussed in Chapter 3 in which China would unlikely have the full title of China to the two archipelagos. Therefore, the dotted line will not be legitimate under this interpretation and there is no need to examine further.

[463] Yehuda Z. Blum, *Historic Titles in International Law,* (The Hague: Maritinus Nijhoff, 1965), p.261.

[464] Leo J. Bouchez, *Regime of Bays in International Law,* (Leyden, A.W.Sijthoff, 1964), p.281, quoted in Zou Keyuan, *op.cit.*, note 453, p.40.

[465] D.P. O'Connell, *The international Law of the Sea,* (Oxford, Clarendon Press, Vol. I, 1982), p.417.

[466] *Fisheries Jurisdiction, Judgment,* ICJ Reports (1951), p.116 at 130.

> a process through which the originally lawful owners, the community of states, are replaced by the coastal State. Title to 'historic waters,' therefore, has its origin in an illegal situation which was subsequently validated. This validation could not take place by the mere passage of time; it must be consummated by the acquiescence of the rightful owners.[467]

Despite all efforts to clarify the concept of historic water, no definition of 'historic water' was given in the LOSC. The 1982 LOSC only refers to historic bay and historic title when it stipulates on the regime of bays, the delimitation of the territorial sea between states with opposite or adjacent coats and limitation and exception in dispute settlement.[468] This may be deliberate because 'historic water' is treated as internal water, thus by such a limited mentioning, the LOSC only allows the application of 'historic water' in the case of bays and within internal and territorial waters. Also, the International Law Commission suggested that States need to fulfil three conditions in order to claim 'historic water', namely (i) the actual exercise of coastal state authority over the area, (ii) continuity over time of this exercise of authority and (iii) the attitude of foreign states to the claim.[469] In a recent US case, the US Supreme Court also clarified that

> [t]o make a historic waters claim, a State must show that the United States exercises authority over the area, has done so continuously, and has done so with the acquiescence of foreign nations. This exercise of sovereignty must have been, historically, an assertion of power to exclude all foreign vessels and navigation, including vessels engaged in "innocent passage," *i.e.*, passage that does not prejudice the coastal State's peace, good order, or security.[470]

In the case of China, the water area it claims is huge, covering almost all maritime spaces in the South China Sea. This area has never become the internal waters of China; other countries still have freedom in navigation and exercise sovereignty rights in the adjacent waters of the Spratlys. In fact, China only landed in the Spratlys in 1988 after a naval attack with Vietnam. The publication of the map without interpretation of the function of the dotted line on the map will not be sufficient to prove China's actual and continuous exercising authority in this water.

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[467] UN Doc. A/CN.4/143, 9 March 1962, titled "Judicial Regime of Historic Waters, Including Historic Bays", (1962) 2 *Yearbook of the International Law Commission,* p.3 at 16, quoted in Zou Keyuan, "Historic Rights in International Law and in China's Practice", (2001) 32 *ODIL,* p.149 at 151.

[468] For example, Article 10(6) says that "[t]he foregoing provisions do not apply to so-called "historic bays"; Article 15 mentions "by reason of historic title" as the exception in applying the meridian line in maritime delimitation, etc.

[469] UN Doc. A/CN.4/143, 9 March 1962, titled "Judicial Regime of Historic Waters, Including Historic Bays", (1962) 2 *Yearbook of the International Law Commission,* p.3 at 13, referred in Zou Keyuan, *op.cit.*, note 467 at p.151.

[470] Alaska v. US, 545 US 75, 125 S.Ct. 2137 (2005) at 2141.

Furthermore, other states have never expressed their recognition of China's claim. A Vietnamese official said that the dotted line of China was exaggerated and legally groundless. "There is nothing in the international law of the sea that can justify this kind of claim."[471] Indonesia also expressed its concern over the publication of Chinese maps showing the unclear dotted lines. Hasjim Djalal, a senior Indonesian diplomat, commented that "the Chinese territorial claims are limited towards the islands and all rights related thereto, and not territorial claims over the South China Sea as a whole".[472] Dr Hamzah, the Director General of the Maritime Institute of Malaysia also indicated that the line as a claim over the entire South China Sea was "frivolous, unreasonable and illogical".[473] Therefore, if the dotted line represents the maritime boundary of China in the South China on the basis of historic water, due to the lack of actual exercising authority and the objection of the states concerned, such a claim will not conform to the international law of the sea.

The final assumption regarding the meanings of the dotted line is that it stands for China's claim of historic rights as in June 1998 China officially promulgated the Exclusive Economic Zone and Continental Shelf Act in which Article 14 says that "the provisions of this Act shall not affect the historic rights of the People's Republic of China".[474] The concept of 'historic rights' is even more complicated to interpret than 'historic water'. The general acceptance is that historic rights are not the source of as great a degree of jurisdictional control as historic water. However, it is not clear whether the historic rights claimed by China are equal to the rights in territorial sea, the EEZ and continental shelf regime. If China wants to interpret historic rights regarding natural resources in the continental shelf, these rights will violate the rights of the coastal states which are generated *ipso facto* and *ab initio* from their mainland.[475] Therefore, the so-called historic rights claimed by China within the dotted line waters are not well founded in the

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[471] Huynh Minh Chinh, "Sovereignty of Vietnam over Hoang Sa (Paracels) and Truong Sa (Spratlys) and Peaceful Settlement of Disputes in the Bien Dong Sea (South China Sea)" in *ASEAN in the 21st Century: Opportunities and Challenges,* (Hanoi: Institute for International Relations, 1996), p.98-9.

[472] Hasjim Djalal, "Conflicting Territorial and Jurisdictional Claims in the South China Sea" (1979) 7 *Indonesian Quarterly,* p.3 at 42.

[473] B.A. Hamzah, "Conflicting Jurisdiction Problems in the Spratlys: Scope for Conflict Resolution" (Paper presented in the Second Workshop on Managing Potential Conflicts in the South China Sea, Bandung, Indonesia, 15-18 July 1991), p.199-200, referred in Zou Keyuan, *op.cit.*, note 453, p.38.

[474] For full text see, (1998) 38 *Law of the Sea Bulletin,* p.28-31 or online at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/chn_1998_eez_act.pdf (accessed on 8 April 2005).

[475] Article 78 of the 1982 LOSC.

international law of the sea. If China wants to imply the rights with regard to living resources in the water only, the LOSC is silent in clarifying whether these rights are equal to the regime of the EEZ or not. However, in a similar situation, the *Eritrea/ Yemen* case[476] dealt with the historic rights concerning fishery by establishing a *res communis* region for both Eritrea and Yemen where the fishermen of both countries would enjoy free access. The Award stated that as the fishery practice was traditionally conducted and the fishing industry was formed an important part of both economies concerned.[477] Also, in the *Barbados v. Trinidad and Tobago* case,[478] when Barbados requested a historical right over flyingfish fisheries within the EEZ of Trinidad and Tobago, although the Tribunal found it lacked jurisdiction over the issue, it recommended that the parties negotiate a satisfactory solution to coordinate and ensure the conservation and development of the flyingfish stocks.[479] These awards implied that historic fishery might exist, but depended on the negotiation of the parties concerned, particularly in cases where the area for historical fishery was within the EEZ of other countries like in the *Barbados v. Trinidad and Tobago* case. This might be applied to the claims of China and Taiwan, and thus their claims might be recognised as the rights to living resources in the water of the claimed area.

Given the analysis of the three assumptions as to the significance of the dotted line claimed by China and Taiwan, the only possibility is for the historic maritime claim of China and Taiwan to be recognised as historic rights in fisheries. In this case, as the fishery practice has not solely belonged to China,[480] negotiation as the suggested in the *Barbados v. Trinidad and Tobago* case[481] should be conducted between China, Taiwan and the other states for joint exploitation of the fishery resources in the waters of the Spratlys. This means that China and Taiwan cannot enjoy other rights such as those of the EEZ regime.

3.3. Overlapping areas: The hypothesis

From the examination in Chapter 2, twelve islands of the Spratlys are likely to have entitlement to full maritime zones. With the presence of the Spratlys in the middle of the

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[476] *Eritrea/Yemen Arbitration Awards.* For discussion on the traditional fishing regime in this case, see Antunes, "The 1999 Eritrea-Yemen Maritime Delimitation Award and the Development of International Law" (2001) 50 *ICLQ* 299 at 305-7.
[477] *Eritrea/Yemen Arbitration Awards*, *ibid,* paras. 62-64.
[478] *Barbados v. Trinidad and Tobago*, 2006
[479] *Ibid,* paras.285-293.
[480] For information on fisheries practice in the region, see Section 2.2, Chapter 1, *supra.*
[481] *Barbados v. Trinidad and Tobago Award,* 2006, paras.292-3.

South China Sea and their ability to generate maritime spaces, many overlapping maritime zones will be created. However, the details of these overlapping zones will depend on the title to the Spratlys. So far, the parties concerned have only lodged territorial claims, but have not clearly made their maritime claims. In order to estimate the overlapping maritime zones in detail, some hypothesis as to the title of the Spratlys will be made. In each hypothesis further assumptions will be made regarding the possibility of the recognition of the historic fishing rights of China and Taiwan.

The first hypothesis is that the Spratlys would belong to several countries. If this title came without the recognition of the fishing rights of China and Taiwan, there would be two groups of overlapping zones, namely (i) the overlapping between the EEZs and continental shelves of the mainlands of coastal states and those of the features of the Spratlys which belong to other states and lie opposite their coasts and (ii) the overlapping of EEZs and continental shelves among the features of the Spratlys (which belong to different states). If the title came with the recognition of historic fishing rights for China and Taiwan, in addition to the above noted overlapping areas, there would be overlapping between the historic fishing rights of China and Taiwan and the fishing rights in the EEZs of coastal states from their mainland and from the features of the Spratlys.

The second hypothesis is that the Spratlys would belong to Vietnam. If the historic fishing rights of China and Taiwan were not recognised, the overlapping areas would be between the EEZs and continental shelf of Vietnam generated from the Spratlys' features with those of the mainlands of the Philippines, Malaysia and Brunei. If the historic fishing rights were recognised, there would be further overlapping between historic fishing rights of China and Taiwan and the fishing rights of other coastal states in their EEZ. In this case, Vietnam would have the fishing rights over the EEZ from its mainland and from the Spratlys' features, whereas the Philippines, Malaysia and Brunei would only have the fishing rights of the EEZs from their mainland.

The last hypothesis would be that the Spratlys belong to China and Taiwan. If this title came alone without historic fishing rights, the overlapping maritime zones would be between the EEZs and continental shelf of China and Taiwan from the Spratlys' features with those from the mainland of the coastal states. If in addition to the title to the Spratlys, China and Taiwan also had historic fishing rights, there would be further overlapping between the historic fishing rights of these two parties with the fishing rights from the EEZ

of the coastal states as the maritime line which China and Taiwan claimed for historic rights covered the larger area than the EEZ of the Spratlys itself.

In addition, there are some islands in the Spratlys which do not qualify under Article 121(3), and which can only generate the internal water, territorial sea and contiguous zone. They are located quite distantly from the mainland of coastal states that no territorial sea overlapping occurs, but closely enough to be within the EEZ and continental shelf of the coastal states. This may create exceptional cases where the overlapping zones occur between the internal water, territorial sea and contiguous zone of these islands of the Spratlys and the EEZ and continental shelf of the coastal states.

In conclusion, whatever the hypothesis as to titles are, there might be four possible types of overlapping maritime zones which need to be delimited, namely (i) to delimit EEZ and continental shelf overlapping between the Spratlys' features and coastal states,[482] (ii) to delimit EEZ and continental shelf overlapping among the Spratlys' features themselves,[483] (iii) to delimit overlapping between the internal water, territorial sea and contiguous zone of the islands of the Spratlys and the EEZ and continental shelf of the coastal states[484] and (iv) to define the fishing zone for the historic fishing rights of China and/or Taiwan and the fishing rights of the EEZ of coastal states (whatever these rights generated from the mainland and/or from the some features of the Spratlys which they have title to them).[485]

Figure 28 illustrates the approximate EEZ from the mainlands of Vietnam, Malaysia and the Philippines by the red, yellow and blue lines respectively. The grey circles are the EEZ of the Spratlys' features. Thus, the dotted blue areas are the maximum overlapping between the EEZ of the mainlands of littoral states and those of the Spratlys, with the assumption that all features which lie opposite these mainlands do not belong to the relevant coastal states. With the location of the Spratlys' features, the Amboyna Cay (currently occupied by Vietnam) may generate a major overlapping with the maritime zones of the mainland of Malaysia; the North Danger Reef, Loaita Bank and Tizard Bank (currently occupied by Vietnam, the Philippines and Taiwan) may cause significant overlapping with maritime zone from the mainlands of Vietnam and the Philippines; and

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[482] See Figure 28 and 29, *infra*.
[483] See Figure 30, *infra*.
[484] See Figure 31, *infra*.
[485] See Figure 32, *infra*.

the Spratly (which is currently occupied by Vietnam) may cause a major overlapping with the maritime zone from the mainland of Vietnam and Malaysia.

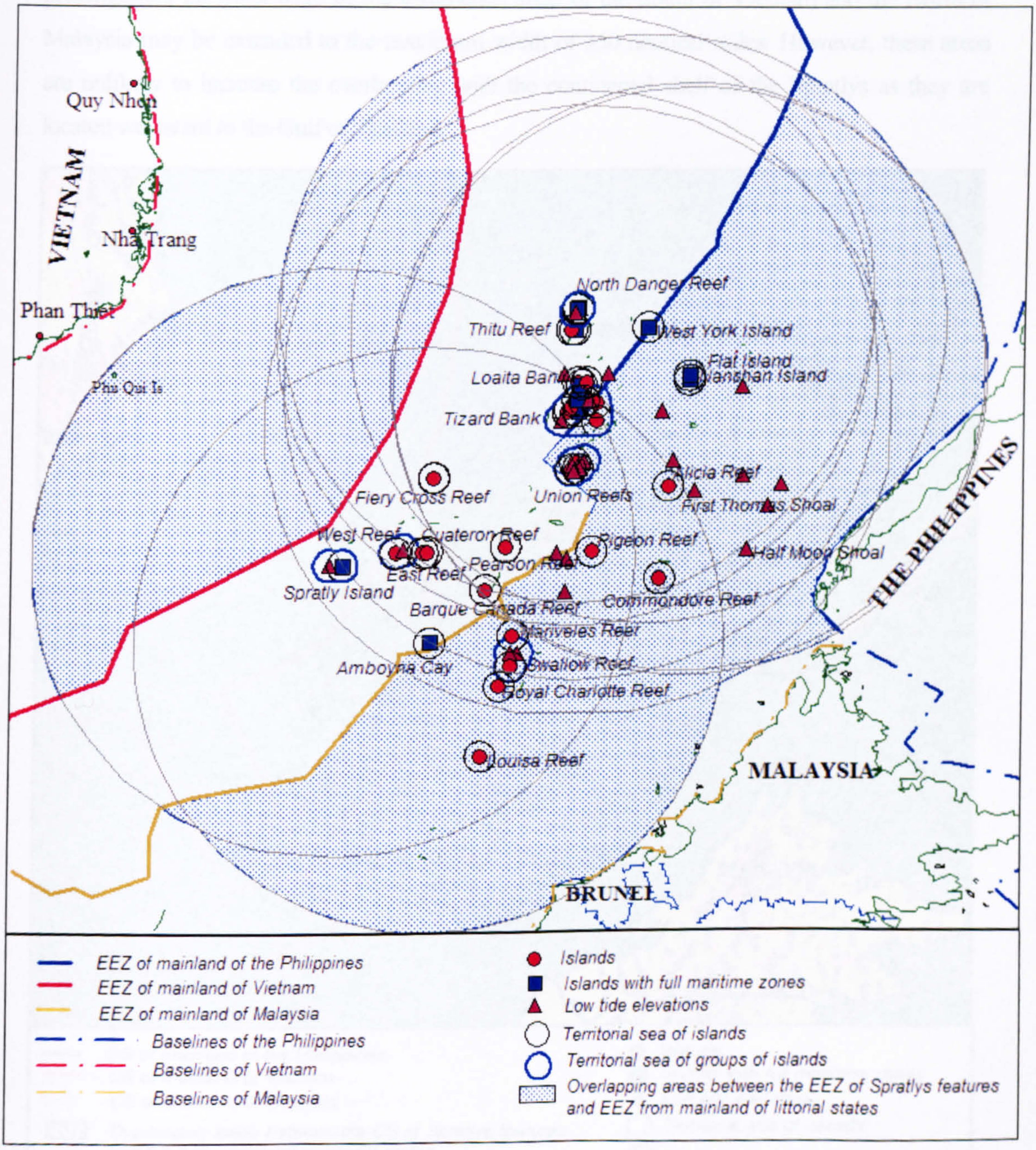

Figure 28. Overlapping EEZs between the Spratlys and coastal states[486]

[486] Map drawn by Mapinfo.

Figure 29 illustrates the maximum overlapping between the continental shelf of the littoral states and those of the Spratlys' features. The particular situation is that with the natural prolongation, the outer edge of the continental shelf of the South of Vietnam and the North of Malaysia may be extended to the maximum width of 350 nautical miles. However, these areas are unlikely to increase the overlapping with the continental shelf of the Spratlys as they are located westward to the Gulf of Thailand.

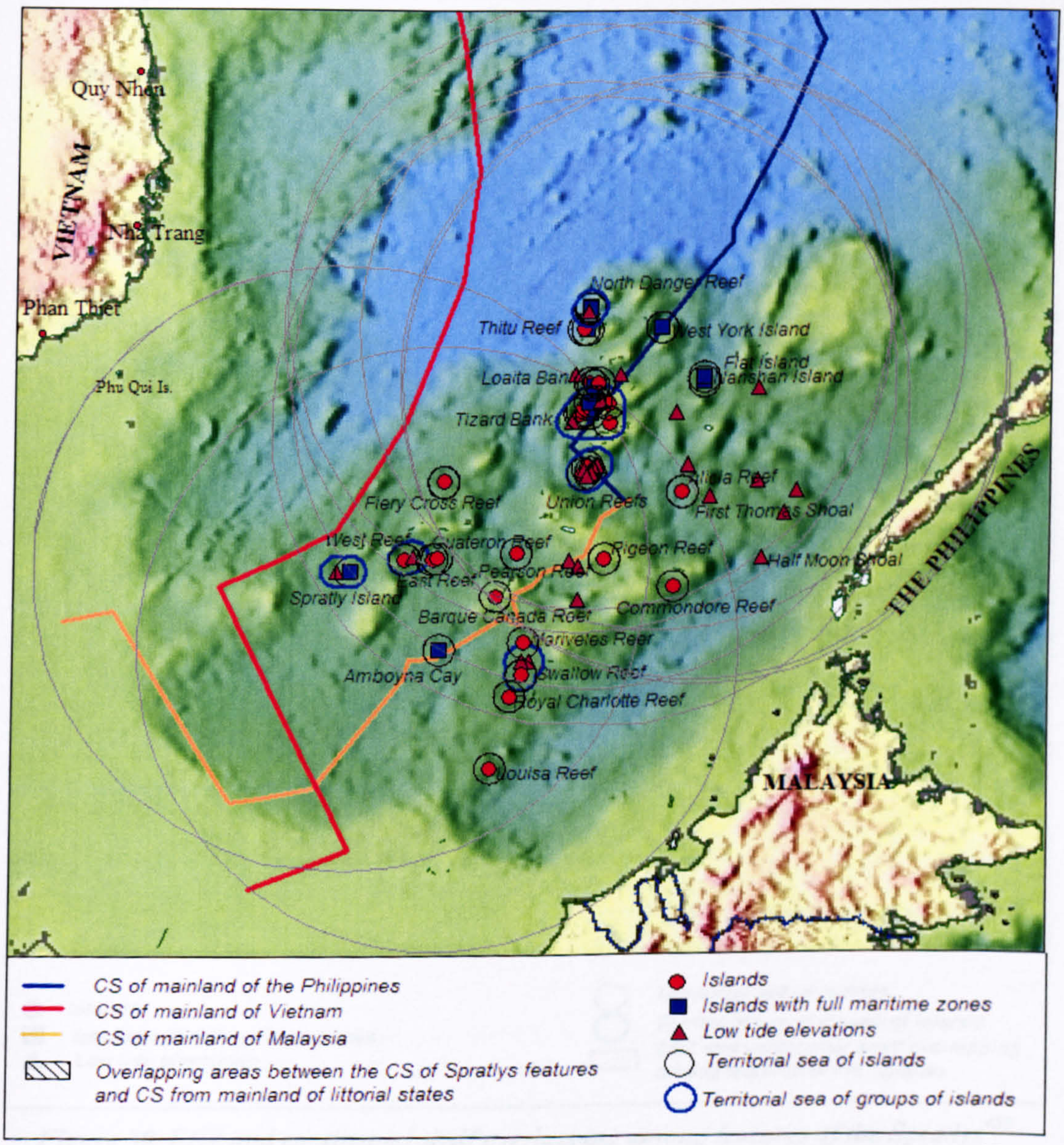

Figure 29.Overlapping continental shelves in the adjacent water to the Spratlys[487]

[487] *Ibid.*

Figure 30 illustrates the overlapping of the EEZ and continental shelf among the features of the Spratlys themselves. Of all the features of the Spratlys, the maximum number of islands which can generate full maritime zone is 12.[488] The grey circles illustrate the EEZ and continental shelf of these features. If these features belong to different states, they will create overlapping among themselves. The dotted pink area illustrates the maximum overlapping among them.

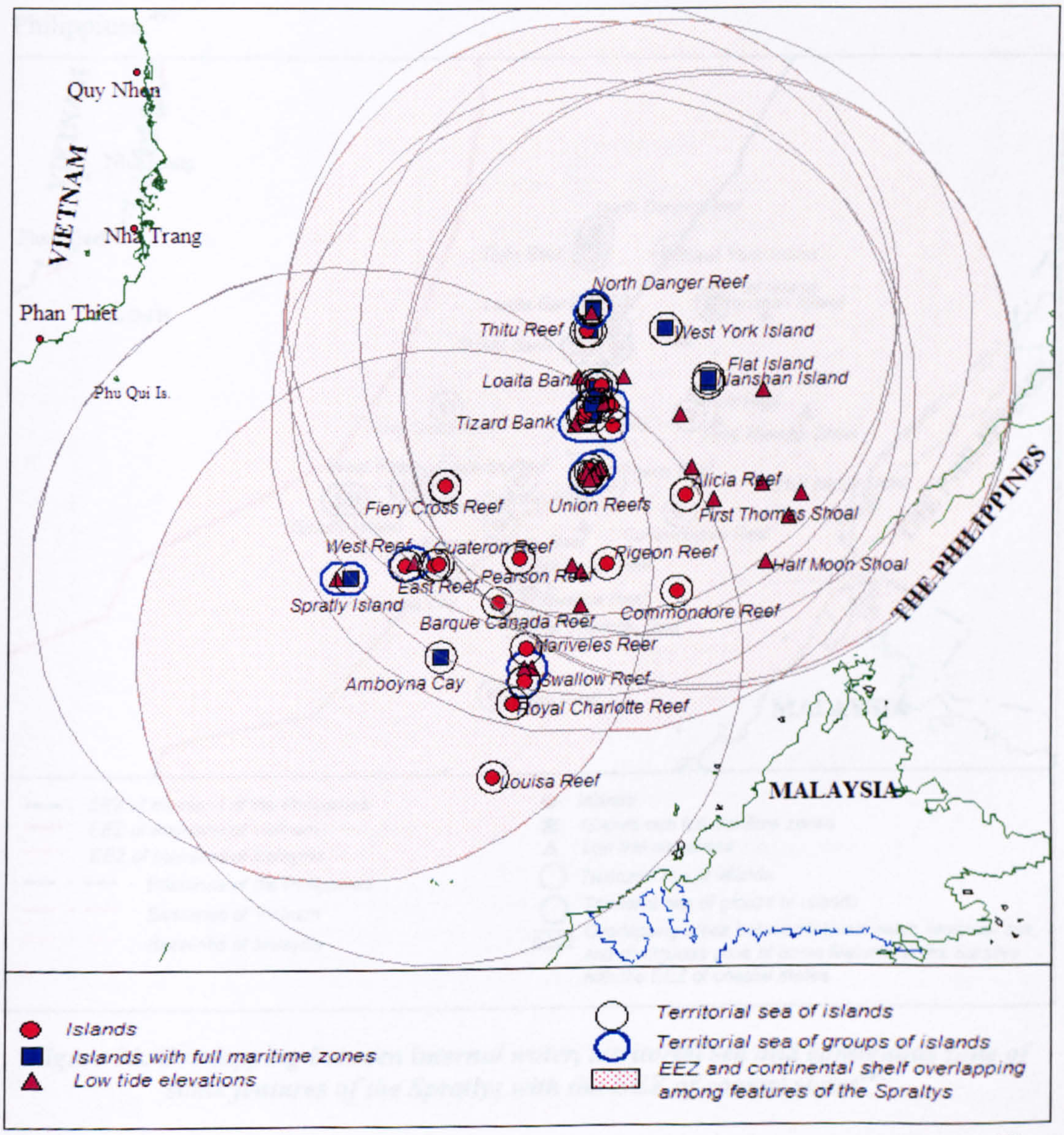

Figure 30. EEZ and continental shelf overlapping among features of the Spratlys[489]

[488] See *supra,* Chapter 2, Section 3.
[489] Map drawn by Mapinfo.

In addition to twelve islands which can generate full maritime zones, there are twenty three islands in the Spratlys which can only generate internal water and territorial sea.[490] Among these islands, some of them are located within the EEZ of littoral states (but outside the territorial sea), thus this may cause exceptional overlapping between the territorial seas of these features with the EEZ of littoral states. The slashed blue area in Figure 31 illustrates the overlapping of such features in the EEZ of Malaysia and the Philippines.[491]

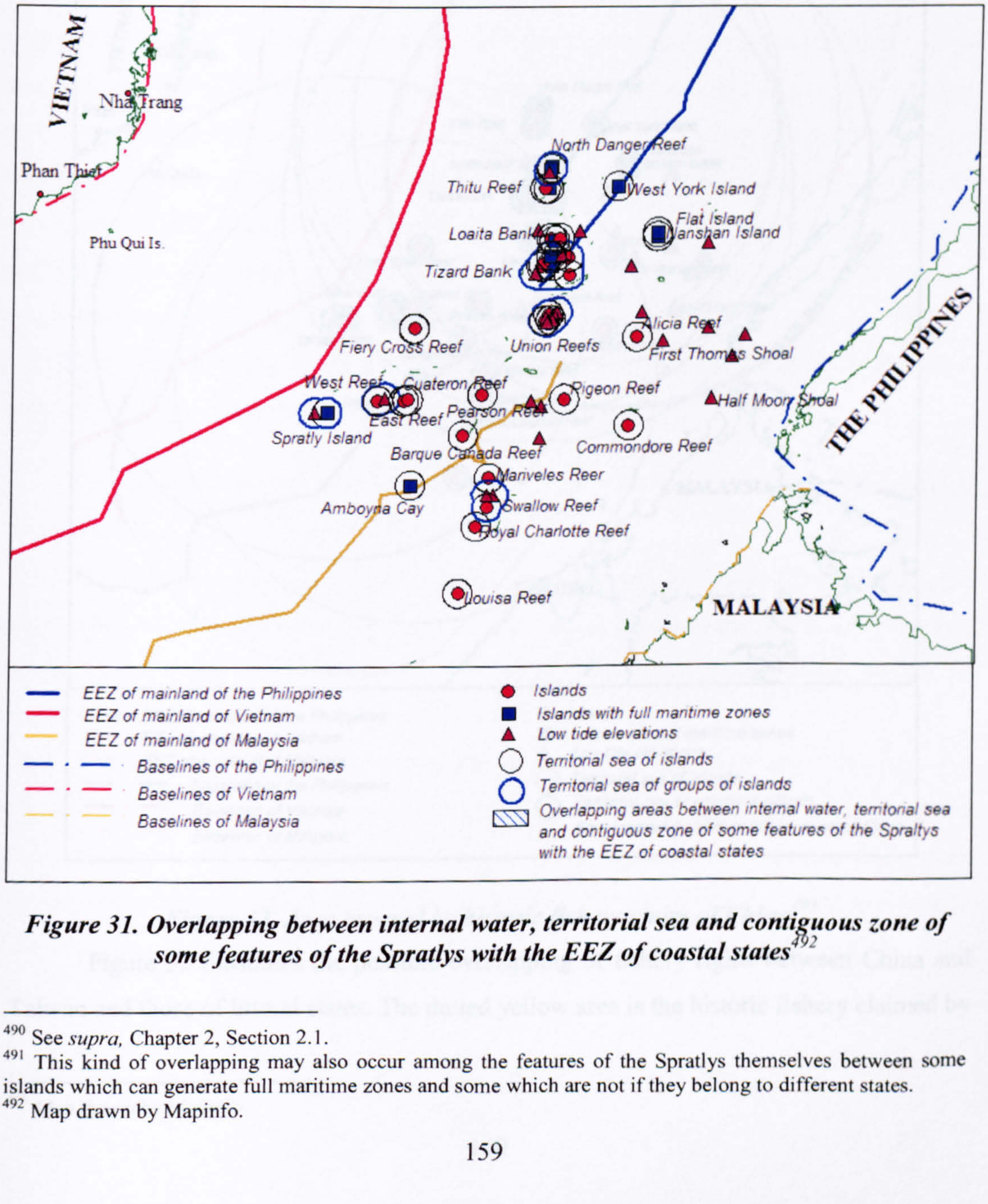

Figure 31. Overlapping between internal water, territorial sea and contiguous zone of some features of the Spratlys with the EEZ of coastal states[492]

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[490] See *supra,* Chapter 2, Section 2.1.

[491] This kind of overlapping may also occur among the features of the Spratlys themselves between some islands which can generate full maritime zones and some which are not if they belong to different states.

[492] Map drawn by Mapinfo.

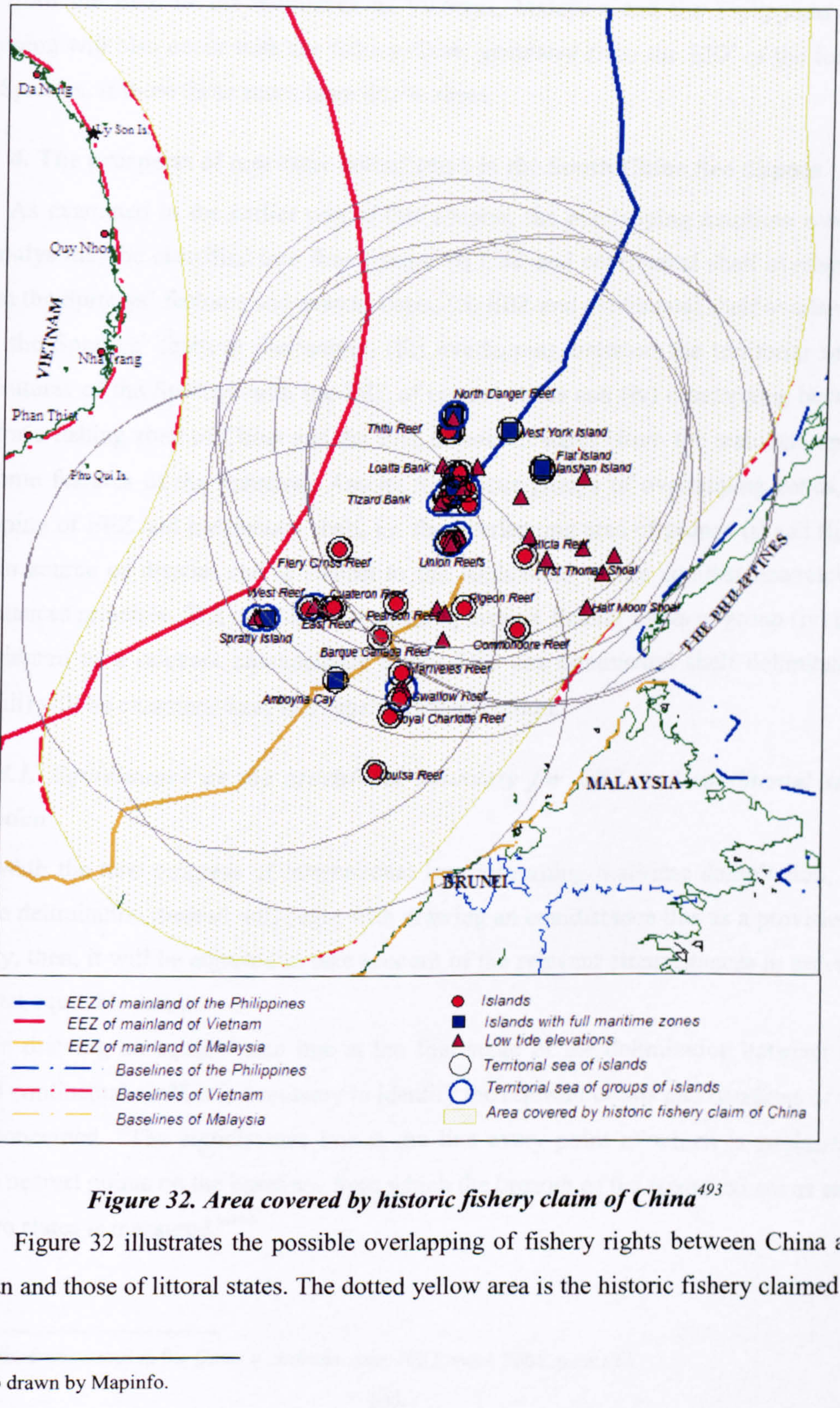

Figure 32. Area covered by historic fishery claim of China[493]

Figure 32 illustrates the possible overlapping of fishery rights between China and Taiwan and those of littoral states. The dotted yellow area is the historic fishery claimed by

[493] Map drawn by Mapinfo.

China and Taiwan. If this area is recognised, it will cause overlapping with the fishery rights from the EEZ of the mainlands of Vietnam, Malaysia and the Philippines. This overlapping will also occur with the fishery rights generated from the EEZ of the features of the Spratlys, if these three states have title to them.

4. The prospects of maritime delimitation in the South China Sea dispute

As examined in the earlier part of this chapter, the overlapping maritime zones in the Spratlys may be classified into four groups: (i) EEZ and continental shelf overlapping between the Spratlys' features and coastal states, (ii) EEZ and continental shelf overlapping among the Spratlys' features themselves, (iii) overlapping between the territorial sea of some features of the Spratlys with the EEZ of coastal states and (iv) overlapping between the historic fishing zone of China and the EEZ of coastal states (from the mainland and/or from some features of the Spratlys). Among these four groups of overlapping zones, the overlapping of EEZ and continental shelf, i.e. the overlapping area of groups (i) and (ii), is the main source of dispute and is subject to the application of the equidistance/relevant circumstances principle. The overlapping regarding historic fishing rights of group (iv) may be considered as a relevant circumstance in the EEZ and continental shelf delimitation. Group (iii) will be examined later in a separate consideration.

4.1. Equidistance as the provisional boundary for EEZ and continental shelf delimitation

With the new progress of international law concerning maritime delimitation, the maritime delimitation method will begin with drawing an equidistance line as a provisional boundary, then, it will be adjusted to take account of the relevant circumstances in order to achieve an equitable result.

In drawing an equidistance line at the first stage of the delimitation between the EEZ and continental shelf, it is necessary to identify the relevant coasts and baselines of the parties concerned. "The equidistance line is the line every point of which is equidistant from the nearest points on the baselines from which the breadth of the territorial sea of each of the two states is measured."[494]

[494] The method was stated in the *Qatar v. Bahrain case*, ICJ Report, 2001, para.177.

Of all the parties to the dispute, China and Taiwan are so distant from the Spratlys that their maritime spaces generated from the mainland will not create any effect on the waters of the Spratlys. Therefore, the baselines which will be taken into account for drawing equidistance lines are those of the mainland of Vietnam, the Philippines, Malaysia and Brunei.

Due to the unresolved territorial question, the title to the Spratlys is still unknown. This section will examine the relevant coast and basepoints of the Spratlys in maritime delimitation in general, without any specific implication for title of the Spratlys. As the maritime delimitation for the Spratlys' waters will focus on the overlapping among maritime zones generated not only from the mainland of the coastal states, but also from the Spratlys' features, it is likely that the equidistance line may also draw from the basepoints of the Spratlys' features as well. This is the case when the Spratlys' features are nearby the coast of a coastal state but do not belong to that state. For example, normally without the presence of the Spratlys' features, maritime zones between the Philippines and Vietnam do not overlap. With the presence of the Spratlys' features and supposing that they belong to one of the two or belong to a third country, overlapping might be created between the maritime spaces of the Spratlys' features with those of the mainland coast of one of the two. In this case, basepoints of the Spratlys' features also participate in the drawing of an equidistance line. As examined in Chapter 2, the Spratlys feature may generate their maritime spaces in groups. Accordingly, the basepoints for drawing an equidistance line are some of the features or some low tide elevations of the Spratlys.[495]

In theory, in the maritime delimitation between the Spratlys and the littoral states (if the Spratlys belong to different jurisdictions), the baselines of the Spratlys and of the mainland will be used to draw the equidistance line as the first step in the maritime delimitation process. However, due to the tiny size of the Spratlys' features, it is submitted that the Spratlys may be given a reduce effect for the full effect of the mainland of littoral states. This is also in line with the trend to consider small islands as relevant circumstances in maritime delimitation.[496] In maritime delimitation among the Spratlys' features

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[495] For details, see Chapter 2, *supra*.

[496] For further discuss on the role of Spratlys' features as relevant circumstances in maritime delimitation, see *infra,* Section 4.2.1.

themselves (if they are belong to different jurisdictions), the baseline of each group of features[497] will be used to draw the equidistance lines.

4.2. Relevant circumstances to be taken into account

Relevant circumstances as discussed in the previous section of this chapter might vary and include geographical, economic, social, security and legal factors. Searching for these circumstances in a prospect maritime delimitation for the Spratlys' waters, some potential relevant circumstances may include the presence of tiny islands, the access to the fishery and hydrocarbon resources, security interests of coastal states, navigation interests in the South China Sea and the historic title of China and the Philippines. However, in the trend of building up a more predictable law for maritime delimitation, the recent case law has not paid much attention to the economic, social, security and legal circumstances like in the previous ones. Geographical circumstances seem to be the only element to be taken into account, but in a more strict and careful manner to identify their real effect on maritime delimitation. This section will examine to what extent these circumstances can produce an effect on the maritime delimitation in the South China Sea dispute.

4.2.1. The effect of small islands in maritime delimitation

With the location at the middle of the South China Sea, the Spratlys usually are assumed a high level of importance in maritime delimitation by the party to the dispute. This is partly due to the provisions of the 1982 LOSC that islands which qualify under Article 121(3) are entitled to generate full maritime zones. This explains the rush to occupy features of the Spratlys and fortify claims over this archipelago since the 1970s. In fact, it is true that the majority of overlapping maritime zones is the product of the maritime areas of the islands of the Spratlys and the maritime zones of the mainland of the littoral states or overlapping among the features of the Spratlys themselves. Thus, the islands of the Spratlys will serve two roles. The first role is as relevant circumstances to expand the maritime zones of a littoral state if it is adjacent to the mainland of that state or vice versa if it is opposite. However, as all of the islands in the Spratlys are very tiny, these islands will likely not have a full effect in maritime delimitation with the maritime zones of the mainland of littoral states. The second role is as a source of title to generate maritime zones in maritime delimitation among the features of the Spratlys themselves.

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[497] See *supra,* Chapter 2, Section 5.

Effect of islands in maritime delimitation has been treated in different ways in case law and state practice according to their size and their location in respect of the coasts between which the boundary will be drawn. With the 'wrong side' or 'midway' islands, their effects in maritime delimitation are normally reduced for the effect of the mainland of coastal states.[498] This is particularly true in the case of small and uninhabited islands. In the *Anglo-French Arbitration*,[499] there were three features which led to the adjusting of the equidistance line, namely Eddystone Rock, Channel Island and Scilly Islands. With its adjacent position to the French coastline, the Eddystone was given full effect.[500] Meanwhile, located on the wrong side which are very near the French mainland, the Channel Island was an enclave with only 12 nautical miles[501] and the Scilly Islands was of half effect.[502] Even with some larger islands like the Jan Mayen in the *Jan Mayen* case,[503] which is 30 miles length and 2 miles width, and the Kerkenas Island, with considerable population, economic significance and a large area of 69 square miles in the *Tunisia/Libya* case,[504] both were given approximately half effect in maritime delimitation. Similar conclusions can also be found in cases namely the *Gulf of Maine*[505] and *Libya/ Malta*[506] cases. In *St Pierre and Miquelon Arbitration,*[507] the St Pierre and Miquelon Islands were capable of generating full maritime zones, but were only given 24 nautical miles in the Western segment of the maritime boundary. A reduced effect was also found the wide of their maritime zones in the Southern segment where there was no obstruction with opposite or literally aligned with the Canadian coasts.[508] In the recent case of *Eritrea/Yemen Arbitration,* small islands, namely the single island of al-Tayr and the island group of al-

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[498] Bowett, "Islands, Rocks and Low Tide Elevations in Maritime Boundary Delimitations" in Jonathan I. Charney and Lewis M. Alexander, *op.cit.*, note 98, p.131 at 151.

[499] *Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and France Republic, Decision of June 30, 1977, Report of the Arbitration Awards,* (1979)18 ILM, p. 339 (hereafter referred to as *Anglo-French Arbitration*).

[500] *Ibid,* para.144.

[501] *Ibid,* paras.189-202.

[502] *Ibid,* paras.243-251.

[503] ICJ Report, 1993, at paras.60-61 and 68-69.

[504] ICJ Report, 1982, at paras.79 and 126.

[505] *Delimitation of the Maritime Boundary in the Gulf of Maine Area (US v. Canada), Judgment,* ICJ Reports (1984), p.246 (hereafter referred to as the *Gulf of Maine* case). In this case, the Seal Island, Mud Island and other adjacent features of Canada were given half effect due to their dimensions and geographical position, ICJ Report, 1984, para.222.

[506] The un-inhabited island of Filfla of Malta was ignored for the application of equitable principle, ICJ Report, 1985, para.64.

[507] (1992) 31 *ILM* 1145

[508] For details, see the illustration map and the reasoning of the Arbitration at *ibid,* p.1148 and paras.69-71.

Zubayr were even discounted altogether.[509] In *Qatar v. Bahrain,* the Court also reduced the effect of the small island of Qit'at Jaradah in order to avoid proportionality.[510] In *Cameroon v. Nigeria*, islands belong to a third country was also ignored as relevant circumstances in maritime delimitation.[511]

The same approach was found in state practice. For example, in the Torres Strait Treaty between Australia and Papua New Guinea,[512] a number of small islands of Australia in the Torres Strait which located on the wrong side and very near the coastline of Papua New Guinea are only given 3 nautical miles of territorial sea and no effect on continental shelf delimitation. In eleven other maritime delimitation treaties namely the delimitation of Colombia-Jamaica, Finland-Sweden, Dominican Republic-United Kingdom (Turks and Caicos), Thailand-Vietnam, Equatorial Guinea-Nigeria, Ireland-United Kingdom, Iceland-Norway, Saudi Arabia-Yemen, Estonia-Finland-Sweden and Algeria-Tunisia, the effect of small islands was also discounted or ignored.[513]

The case law and state practice shows that the ability of small islands in generating maritime zones depends on the size of island, its population and its location. The closer the island is to the mainland of its country, the greater its power is to generate a full zone. In contradiction, if the islands are located on the wrong side or at the middle of the meridian line dividing the overlapping maritime zones of two adjacent or opposite states, the further away the islands are, the weaker the effect that islands are able to generate. In some situations, if the maritime zones of islands cause distortion for the maritime delimitation, the islands may exert no effect.[514] In all the discussed cases, small islands have a maximum of half effect in maritime delimitation, even with those islands which have considerable population and economic significance such as the Kerkenas in the *Tunisia/Libya* case.[515] It is also noteworthy that the maximum half effect of all the small islands in these cases was obtained with the back up of the coastline from the mainland.[516] Therefore, it is submitted

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[509] *Eritrea/Yemen Arbitration,* paras.147-8.
[510] However, the Court did not give a concrete explanation of the reduction. ICJ Report, 2001, p.40, at para.219.
[511] ICJ Report, 2002, p.303, at paras.298-9.
[512] Jonathan I. Charney and Lewis M. Alexander, *op.cit.*, note 98, Report 5-3, p.929.
[513] For details, see the analysis of Victor Prescott and Gillian Triggs, "Islands and Rocks and Their Role in Maritime Delimitation" in David Colson and Robert W. Smith (ed.), *International Maritime Boundaries,* (Leiden and Boston: Martinus Nijhoff Publisher, 2005, Vol.5), p.3245 at 3255-9.
[514] This is also the conclusion of Bowett, *op.cit,* note 498 and Prescott, *ibid.*
[515] *Continental Shelf Case (Tunisia v. Libya), Judgment*, ICJ Report (1982), p.18.
[516] The Jan Mayen was an exception. It stood individually in maritime delimitation with the Greenland without the involvement of the mainland of Norway. However, as the Greenland was also an island, thus they

that without the supportive effect of the mainland, the islands would have less effect if they stood individually in maritime delimitation with a mainland.

In the current dispute, the Spratlys' features are located at considerable distances from the mainlands of the coastal states with the nearest features to the coastline of the Philippines, Malaysia and Vietnam 130, 132.4 and 230.2 nautical miles respectively.[517]

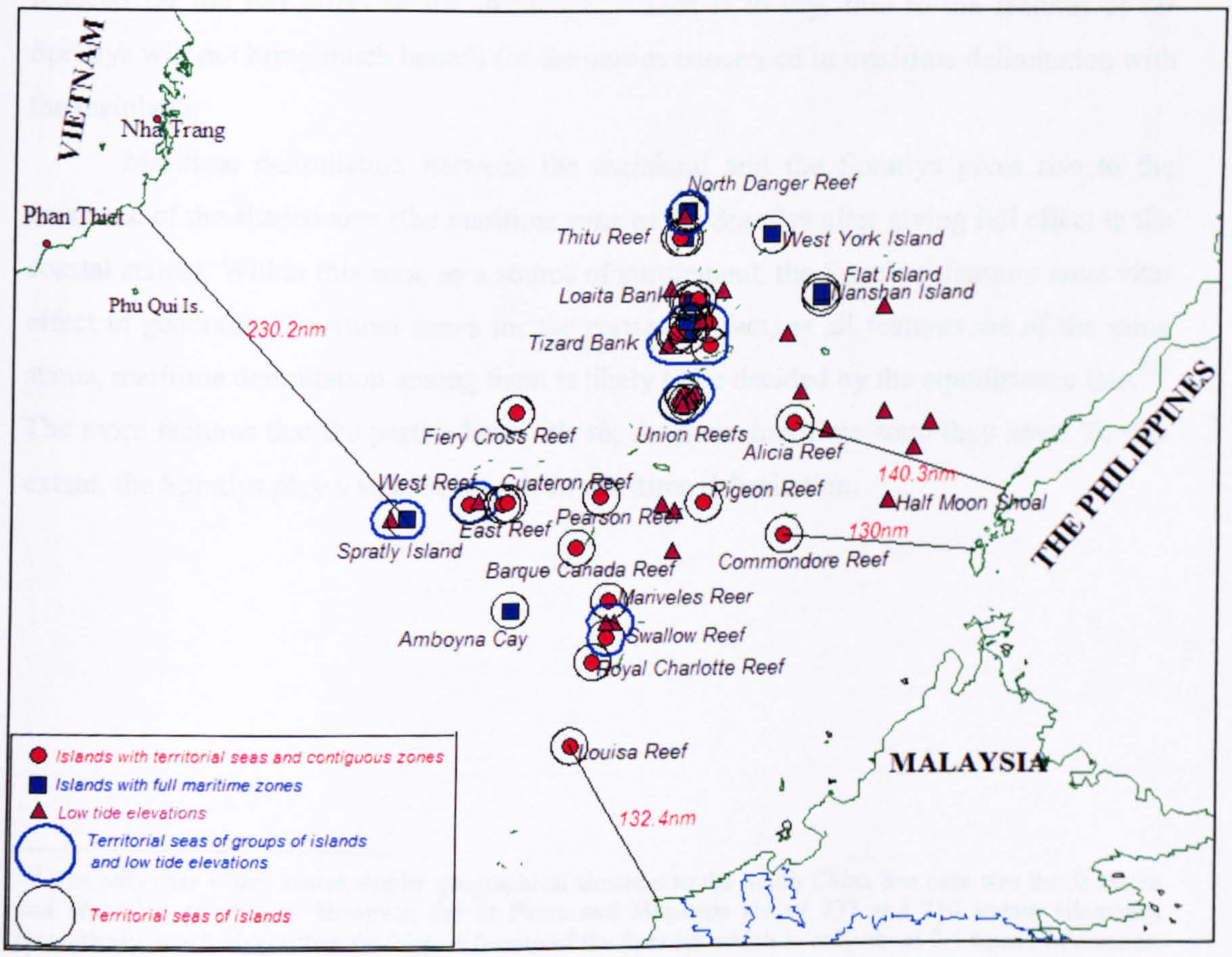

Figure 33. Distance from some nearest features of the Spratlys to coastal states[518]

All of the features are too small (smaller than most of the cases mentioned above)[519] and have no inhabitants. Furthermore, they stand as opposite "coasts" without the

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had equal effect in generating maritime zone. Therefore, the reduced effect of the Jan Mayen in maritime delimitation was not because Jan Mayen is an island, but because of the proportionality between the coastal length of the two islands.

[517] Information calculated from Mapinfo program, for illustration, see Figure 33.

[518] Map drawn by Mapinfo.

[519] For their sizes and other characteristics, see *infra,* Annex 1.

supportive effect of any mainland in maritime delimitation with the coasts of the mainland of littoral states. Hence, being small islands in maritime delimitation with mainlands, the features of Spratlys themselves may be relevant circumstances that lead to the adjustment of the equidistance lines. Without the supportive effect of a mainland, the effect of the Spratlys in maritime delimitation with littoral states might be much lower than those of the cases mentioned above.[520] One of the possibilities is that effect of these features will be reduced for the full effect of the mainland.[521] That is to say, title to the features of the Spratlys will not bring much benefit for the parties concerned in maritime delimitation with the mainland.

Maritime delimitation between the mainland and the Spratlys gives rise to the existence of the shaded area (the maritime zone of the Spratlys after giving full effect to the coastal states). Within this area, as a source of entitlement, the Spratlys' features have vital effect in generating maritime zones for the parties. In fact, as all features are of the same status, maritime delimitation among them is likely to be decided by the equidistance line.[522] The more features that the parties have title to, the more maritime zone they have. To this extent, the Spratlys play a significant role in maritime delimitation.

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[520] The only case which shares similar geographical situation to the South China Sea case was the *St Pierre and Miquelon Arbitration.* However, the St Pierre and Miquelon are of 237 and 210 square kilometres respectively, much bigger than the biggest feature of the Spratlys which is only about 0.4 square kilometres. Taking into account their size and inhabitation, the St Pierre and Miquelon were only given 24 nautical miles in the Western segment and a much reduction in the wide of their maritime zone in the Southern segment in maritime delimitation with some islands and coast of the mainland of Canada (For details, see (1992) 31 *ILM* 1145 at paras 18-23 and 69-71). With much smaller in size and having no inhabitation, it is submitted that the effect of the Spratlys must be smaller than those of St Pierre and Miquelon.

Even in a theoretical scenario that the Spratlys would be considered as opposite "coasts" in maritime delimitation with the mainland of littoral states, the disparity of 1 to thousands between the coast length of the Spratlys and the mainland would well be considered as an extreme disproportion that lead to an adjustment of the meridian lines. In the *Gulf of Maine* case, a ratio of only 1 to 1.38 was considered as sufficient to justify a correction of a median line delimitation (ICJ Report, 1984, para.222). For discussion on the role of proportionality in maritime delimitation, see Tanaka Yoshifumi, "Reflection on the Concept of Proportionality in the Law of Maritime Delimitation", (2001) 3(16) *IJMCL* 433.

[521] See illustration in Figure 34, *infra.*

[522] For further discussion, see *infra,* Section 5 of this Chapter.

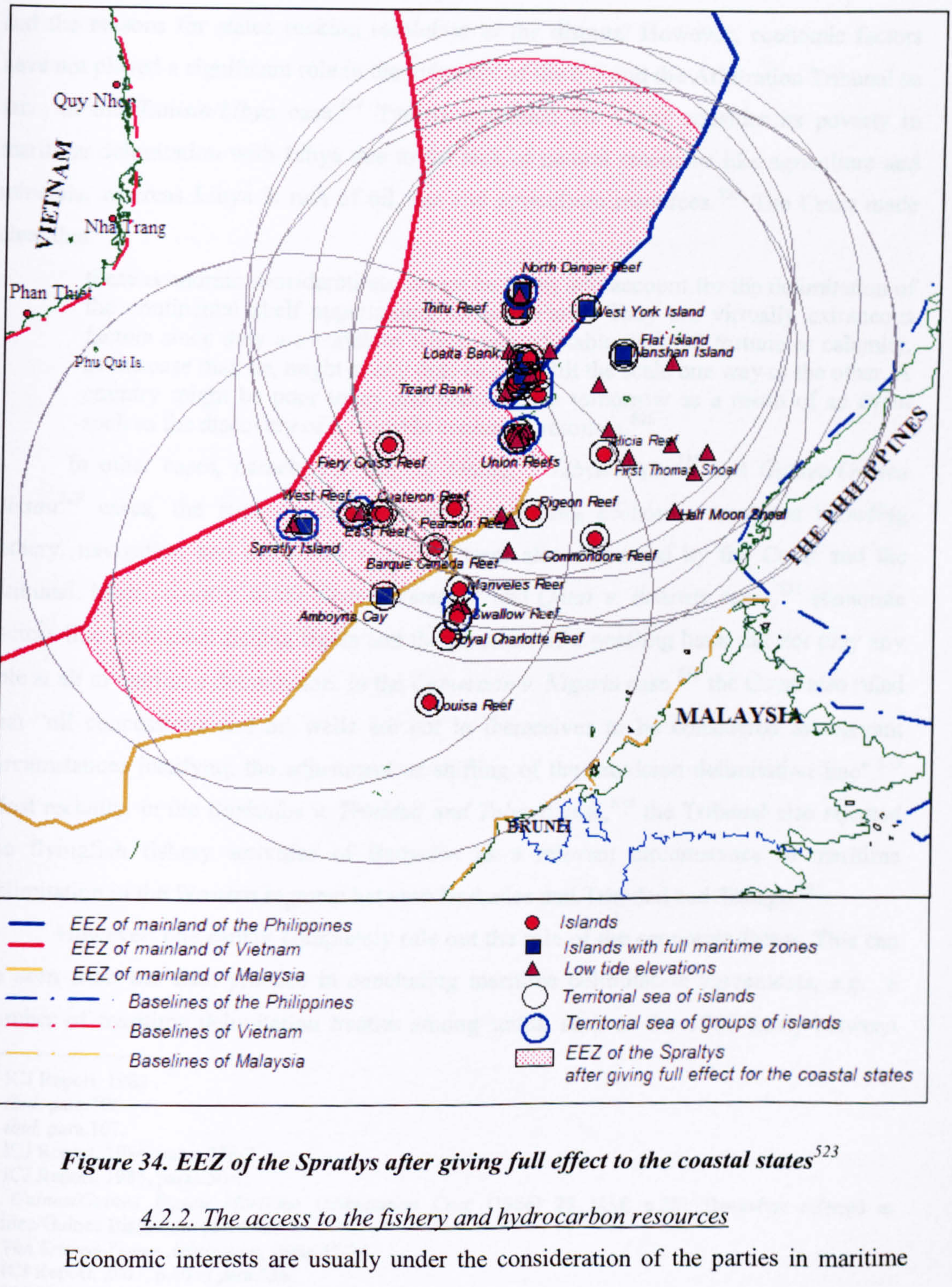

Figure 34. EEZ of the Spratlys after giving full effect to the coastal states[523]

4.2.2. The access to the fishery and hydrocarbon resources

Economic interests are usually under the consideration of the parties in maritime delimitation process because, in many cases, economic interests are the cause of the dispute

[523] Map drawn by Mapinfo.

and the reasons for states seeking resolution to the dispute. However, economic factors have not played a significant role in the judgment of the ICJ and the Arbitration Tribunal so far. In the *Tunisia/Libya* case,[524] Tunisia requested the Court consider its poverty in maritime delimitation with Libya due to the lack of natural resources like agriculture and minerals, whereas Libya is rich of oil, gas and agriculture resources.[525] The Court made clear that

> these economic considerations cannot be taken into account for the delimitation of the continental shelf appertaining to each Party. They are virtually extraneous factors since they are variables which unpredictable national fortune or calamity, as the case may be, might at any time cause to tilt the scale one way or the other. A country might be poor today and become rich tomorrow as a result of an event such as the discovery of a valuable economic resource.[526]

In other cases, namely the *Gulf of Maine,*[527] *Libya/Malta*[528] and *Guinea/Guinea Bissau*[529] cases, the requests of the parties concerning economic resources including fishery, navigation and petroleum resources were also dismissed by the Court and the Tribunal. More recently, in the *Eritrea/Yemen*[530] and *Qatar v. Bahrain* cases,[531] economic factors like traditional fishing rights and the presence of a pearling bank did not play any role at all in maritime delimitation. In the *Cameroon v. Nigeria* case,[532] the Court also ruled that "oil concessions and oil wells are not in themselves to be considered as relevant circumstances justifying the adjustment or shifting of the provision delimitation line".[533] Most recently, in the *Barbados v. Trinidad and Tobago* case,[534] the Tribunal also rejected the flyingfish fishery activities of Barbados as a relevant circumstance in maritime delimitation in the Western segment between Barbados and Trinidad and Tobago.[535]

However, one cannot completely rule out the role of the economic factor. This can be seen from the state practice in concluding maritime delimitation agreements, e.g. a number of maritime delimitation treaties among states, such as the 1980 treaty between

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[524] ICJ Report, 1982 .
[525] *Ibid,* para.106.
[526] *Ibid,* para.107.
[527] ICJ Report, 1984, paras.236-7.
[528] ICJ Report, 1985, paras.50-1.
[529] *Guinea/Guinea Bissau Maritime Delimitation Case* (1986) 25 *ILM*, p.251 (hereafter referred as Guinea/Guinea Bissau), at paras.121-3.
[530] *The Eritrea-Yemen Arbitration*, paras.47-74.
[531] ICJ Report, 2001, p.40 at para.236.
[532] ICJ Report, 2002.
[533] *Ibid,* para.304.
[534] *Barbados v. Trinidad and Tobago*, 2006.
[535] *Ibid,* paras.266-9.

France (Guadeloupe and Martinique) and Venezuela,[536] the 1972 treaty between France (St. Pierre and Miquelon) and Canada,[537] etc.[538] all take economic factors as relevant circumstances. The Court itself once stated that "the economic preoccupations so legitimately put forward by the Parties should quite naturally encourage them to consider mutually advantageous cooperation with a view to achieving their objective, which is the development of their countries".[539] Hence, in addition to sovereign title - a basis for generating maritime rights and other geographical characteristics as special circumstances - economic interests are factors which should be taken into account in maritime delimitation in order to arrive at an equitable solution. Otherwise, at the least, economic interests are conditions for states to establish cooperation to obtain better mutual benefits for the parties concerned. This is also the right approach in the case of the Spratlys where hydrocarbon and fishery resources are considered abundant in the adjacent water of the archipelago and they are one of the main causes of the dispute. At the moment, as the fishery and hydrocarbon are not fully explored, the access to these resources may not be taken into account as special circumstances in a prospect maritime delimitation. However, these factors should be considered for further cooperation among the states in the region in order to sustainably and peacefully manage the resources of the South China Sea.

4.2.3. The effect of historic title of China and the Philippines

The historic title of China was already discussed in the earlier part of this Chapter.[540] In the maximum possibility, the historic claim of China would only be recognised as an historic right relating to fishing. If this right is recognised solely for China due to their traditional practice in the South China Sea, the outer limit of the zone for the fishing rights of China might create a relevant circumstance in maritime delimitation. That limit may be recognised as the boundary for fishing rights between China and the coastal states. However, such recognition would hardly occur as the dominance in fishing by China's fishermen only took place before the 15th century. After this time, China lost its maritime power and the resources in the South China Sea were exploited by several coastal

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[536] Report No. 2-11 in Charney and Alexander, *op.cit,* note 98, Vol.1, p.603.
[537] *Ibid,* Report No. 1-2, p.387.
[538] For further details of state practice concerning economic interests in maritime delimitation treaties, see Barbara Kwiatkowska, "Economic and Environmental Considerations in Maritime Boundary Delimitations" in Charney and Alexander, *op.cit,* note 98, Vol.1, p.75.
[539] *Guinea/Guinea Bissau,* (1986) 25 *ILM* 252, paras.123.
[540] See Section 3.2, *supra.*

states as well as some European maritime powers.[541] Currently, fishing in the South China Sea also does not solely belong to China's fishermen.[542] Therefore, a similar approach to the *Eritrea/Yemen* case may be suitable for situation of the South China Sea. In the *Eritrea/Yemen* case, although the historic fishing right was not a relevant circumstance for maritime delimitation, the arbitration directed the parties to commence negotiations, in good faith, with a view towards concluding an agreement describing the ways in which nationals of both parties may use the resources of the mid-sea islands and their maritime zones, as those zones were described in the Award of the Tribunal, and details a mechanism of binding dispute resolution to settle any and all disputes arising out of the interpretation or application of the agreement.[543]

With regard to the historic title of the Philippines, it is noteworthy to mention the Treaty of Peace between the United States and Spain, concluded in Paris on 10 December of 1898 in which Article 3 provided that "Spain cedes to the United States the archipelago known as the Philippines islands lying within the following lines..."[544] Accordingly, a system of lines defined by various parallels of latitude and meridians of longitude was issued. These lines are illustrated as the red line in an approximate rectangle shape in Figure 35 as follows:

[541] For further discussion, see Section 2.1, Chapter 3, *supra*.
[542] For information on fisheries practice in the region, see Section 2.2, Chapter 1, *supra*.
[543] *The Eritrea/Yemen Arbitration Awards*, paras.87-112.
[544] 4 *Whiteman Digest of International Law*, p.286.

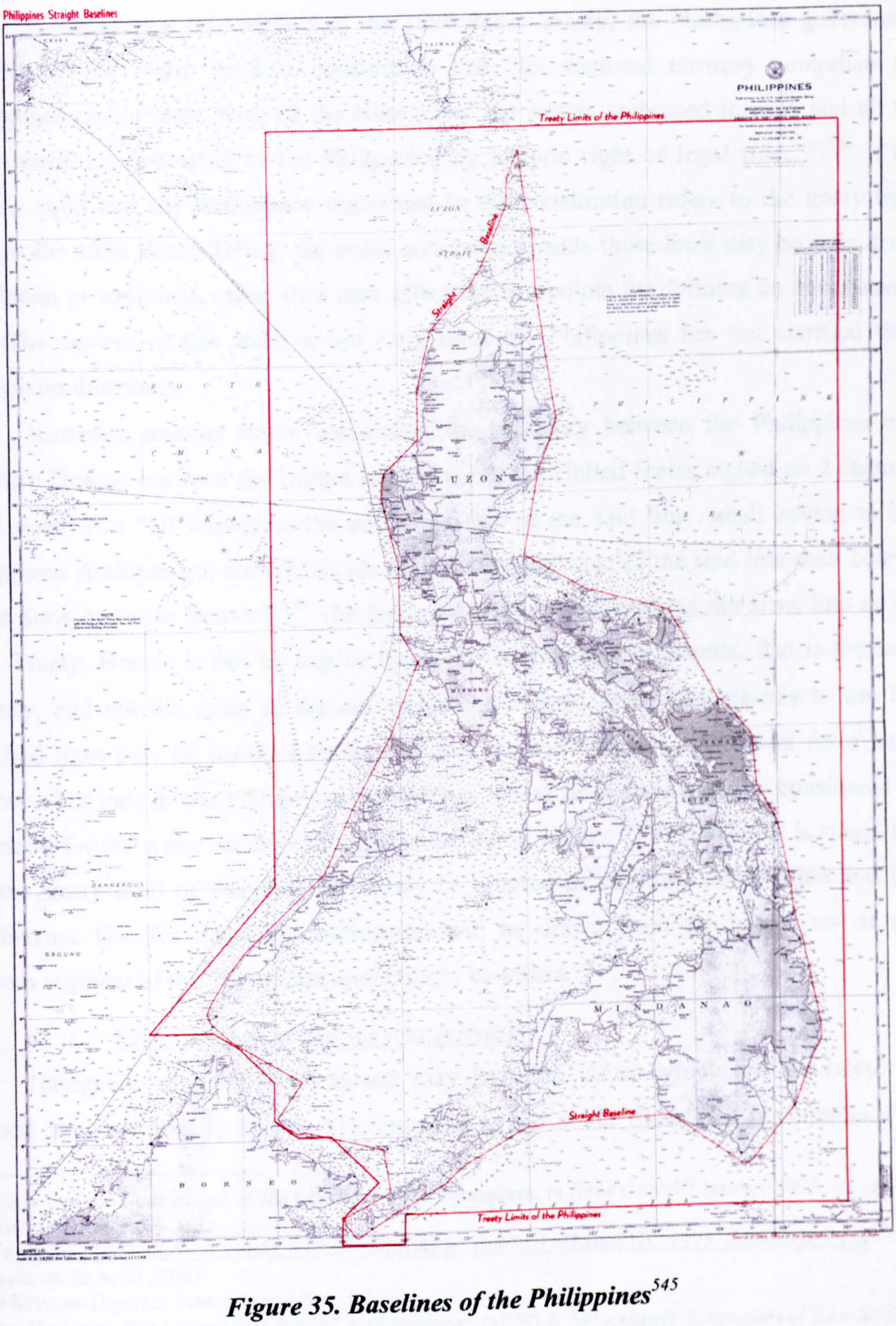

Figure 35. Baselines of the Philippines[545]

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[545] Sources: United Nations, *The Law of the Sea: Baselines: National Legislation with Illustrative Maps*, (Office for Ocean Affairs and the Law of the Sea, 1989), p.259.

In connection to Article 3 of the 1898 Peace Treaty, the Philippines government implies historic claim in their constitution that "the national territory comprises the Philippines archipelago, with all the islands and the waters embraced therein, and all the other territories belonging to the Philippines by historic right or legal title...".[546] If the historic right that the Philippines mentioned in the constitution refers to the treaty limit lines in the 1898 Peace Treaty, the water area bound inside these lines may be considered as internal or territorial water, thus may affect the basepoints for defining an equidistance line. The answer to this issue is not clear since the Philippines has not clarified their position on this point.

However, another treaty concerning the boundary between the Philippines and Northern Borneo between the United Kingdom and the United States signed on 2 January 1930 stated that "all islands to the north and east of the said line...shall belong to the Philippines Archipelago, and all islands to the south and west of the said line shall belong to the State of North Borneo".[547] The line mentioned in this treaty is the same line as the 1898 Treaty. Hence, it can be argued that both treaties refer to islands, that is the land territory, and not the areas of the sea within the defined lines. The reasons to use the specified lines may be justified by the practical method which is convenient for a large number of islands of the Philippines archipelago. Those lines should not be considered as any claim for the water inside as internal or territorial waters.[548] Therefore, it is submitted that the treaty limit of the Philippines may be ignored in maritime delimitation and the equidistance line for maritime delimitation will be drawn from the basepoints of the Western segment of the Philippines archipelagic baselines.

4.2.4. Navigation and security interests

Navigation and security interests may be other issues which can be raised as relevant circumstances in maritime delimitation as the South China Sea is considered as

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[546] Article 1 of the Constitution of the Republic of the Philippines, in force since 17 January 1973, full text of the Article available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_1973_Constitution.pdf (accessed on 30 April 2006).

[547] 4 *Whiteman Digest of International Law*, p.287.

[548] Max Sorenson, "The Territorial Sea of Archipelagos" (1959) 6 *Netherlands International Law Review*, cited in Dubner, *The Law of Territorial Waters of Mid-Ocean Archipelagos and Archipelagic States*, (The Hague: Martinus Nijhoff, 1976), p.41. Similar interpretation is placed upon British legislation concerning the Queensland Barrier Reef, the Cook Islands and the Fiji Islands. For details, see ICJ Judgment in the *Fisheries* case, Pleading, Oral Arguments, Documents, Vol. II, Reply of the UK, p.522, quoted in 4 Whiteman digest, p.287.

possessing strategic positions for the navigation and security of the coastal states.[549] With regard to the navigation interests, all the main routes for international navigation follow the sea between Vietnam and the Spratlys. These routes are neither too close to the water of Vietnam nor that of the Spratlys, thus they are likely within the EEZ, and under the 1982 LOSC the freedom of navigation will not be affected. Within the water of the Spratlys itself, there is no navigation route as the Spratlys is always considered a source of hazard for navigation. Hence, there is no reason to consider navigation interests as relevant circumstances for maritime delimitation. This may only be a topic for further cooperation among states concerned to ensure the safety of navigation.

With regard to the security interests, the usage of the Spratlys depends on the title to this archipelago and this is left unanswered due to the difficulty in solving the sovereignty issue. However, due the fact that the Spratlys have long stood in the perception of the littoral states as of strategic importance for their security policy,[550] security interests may be raised as relevant circumstances in any maritime delimitation process for the South China Sea. From state practice and case law, security interests often appeared in the request for an adjustment of the parties. This included the cases of *Anglo-French Arbitration,*[551] *Gulf of Maine,*[552] *Malta/Libya*[553] and most recently in *Qatar v. Bahrain.*[554] However, the Court and Tribunal in these cases ruled out the possibility of using security interests as relevant circumstances by reasoning that "common defence arrangements may require an examination of valid considerations of political ...character",[555] but were not relevant to determining the boundary, particularly when the delimitation was "not so near to the coast of either parties as to make the questions of security a particular consideration".[556] Even in the *Qatar v. Bahrain* case where the Jazirat Hawar Island locates very close the coast of

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[549] See Section 1.2, Chapter 1, *supra*.
[550] *Ibid*
[551] In this case, securities interests of both France and the UK were the continuous continental shelf between their mainlands and the Channel Islands. For details of their arguments, see *Anglo-French Arbitration Award,* (1979) 18 *ILM,* p.399 at paras.161 and 175.
[552] The security interests in *Gulf of Maine* were the predominant interest that the US claimed it provided for the defence of the region. For details, see US Memorial, paras.131-2.
[553] Security interests were also considered as a concern of both Libya and Malta in this case where the maritime delimitation area was close to the centres of populations and the Maltese idea of 'apron of jurisdiction.' For details, see Maltese Memorial, para.149 and Libyan Counter-Memorial, para.210.
[554] Qatar raised the arguments concerning its security interests (Counter-Memorial submitted by Qatar, 1997, p.230-1), but the Court was silent on this issue.
[555] Judgment of the *Gulf of Maine* case, ICJ Report (1984), para.59.
[556] Judgment of the Malta/Libya case, ICJ Report (1985), para.51.

Qatar, the Court did not considered the security interests of Qatar as relevant circumstances in maritime delimitation. In the South China Sea case, the distance from the Spratlys to the coastal states is much larger. Even though the Spratlys was used for military purposes to attack some coastal states during the Second World War, currently, with modern military technology, distance is no longer a good justification for security. Thus, it is submitted that security interests may not be considered as relevant circumstances for maritime delimitation in the South China Sea dispute.

4.3. Should a single maritime boundary be applied in the South China Sea dispute

The application of a single or separate maritime boundary has not been a common rule in the law of maritime delimitation. For the practical method, the single maritime boundary has been chosen in case law and the majority of state practice. However, the application in fact will depend on the specific situation of each case and the choice of the parties concerned.

In the South China Sea, elements leading to the application of the separate maritime boundary may be the prolongation of the seabed of Vietnam and Malaysia and the historic fishing rights of China and/or Taiwan. Regarding the prolongation of the seabed of Vietnam and Malaysia, as discussed earlier in this chapter,[557] if Vietnam and Malaysia submit the outer edge limit of the continental shelf to the Commission on the Limits of the Continental Shelf and have the acceptance from the Commission, their continental shelf may be expanded to a maximum width of 350 nautical miles or 100 nautical miles from the 2,500 metre isobath. Meanwhile, the largest distance from the centre of the Spratlys to coastal states is less than 400 nautical miles,[558] thus the maritime overlapping between the Spratlys and the coastal states will occur in both the EEZ and the continental shelf.

In theory, it might be possible to delimit a separate maritime boundary for the EEZ and the continental shelf as the prolongation might be considered as relevant circumstance to shift the maritime boundary for continental shelves further for coastal states. However, in practice, as the overlapping between the Spratlys and the coastal states will occur in both the EEZ and the continental shelf, delimiting separate maritime boundaries will hardly occur because of the difficulty in exploiting the resources of the EEZ and the continental

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[557] Section 3.1.2 this Chapter, *supra*.
[558] For details, see Section 1.1, Chapter 1, *supra* and Figures 28 and 29, *supra*.

shelf if these two zones belong to different jurisdictions. However, separate maritime boundaries may be used for the fishing zone and the continental shelf. This is the case when the historic fishing right of China is to be recognised or a common fishing zone will be established in the South China Sea. Furthermore, as the sovereignty is still unresolved, the parties may arrive at a concession to joint exploitation of the resources in the South China Sea. In this case, it is also possible for them to choose different zones for each field of cooperation, e.g. different limits for exploiting living resources and mineral resources. In addition, as the maritime spaces under the consideration of this thesis are the maximum possible due to the broad interpretation of Article 121(3),[559] if the parties concerned agree on the other capacity of the Spratlys in generating maritime zones, the maritime overlapping between the mainland of coastal states and the Spratlys will be reduced and open to the possibility of separate maritime boundaries. Again, the use of single or separate maritime boundaries is greatly dependent on the choice of the parties in the South China Sea dispute.

If the Commission on the Limits of the Continental Shelf do not agree with the extended outer edge of the continental shelf of Vietnam and Malaysia, the normal breadth of 200 nautical miles will be applied. In this case, it will be likely that the maritime delimitation in the South China Sea results in a single maritime boundary. However, from the consideration process of the Commission on the Limits of the Continental Shelf, some legal issues may be clarified. The precedents set by the submission of Russia, Brazil, Australia and Iceland[560] recently showed that in addition to the geographical consideration, the Commission also received the statements of countries concerned regarding their potential overlapping of maritime zones from the submission.[561] By considering whether the reaction of these countries should be taken into account, the Commission might have to deal with some issues concerning maritime zones generation among these states.[562] In the

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[559] For details of the arguments, see Section 3.5, Chapter 2, *supra*.

[560] For information relating to these submissions, see http://www.un.org/Depts/los/clcs_new/clcs_home.htm (accessed on 16 April 2006).

[561] For example, the Russia submission was reacted to by five states, namely Canada, Norway, Japan, Denmark and the United States. For full text of these reactions, see CLCS.01.2001.LOS/CAN, CLSC.01.2001.LOS/DNK, CLCS.01.2001.LOS/JPN, CLCS.01.2001.LOS/NOR and CLCS.01.2001.LOS/USA online at http://www.un.org/Depts/los/clcs_new/clcs_home.htm (accessed on 16 April 2006).

[562] For example, in making recommendations to Russia with regard to Norway's reaction, the Commission referred to the treaties between the two countries in the Barents and Bearing Seas. Also, by examining the relevance of Japanese note, the Commission indicated that all the seabed of the Sea of Okhotsk is part of the legal continental shelf and can hardly be considered to be prejudicial to the position of Japan with respect to

case of the South China Sea dispute, if the submission of Malaysia and Vietnam is rejected by other littoral states, the overlapping can only result from the Spratlys, thus the Commission to some extent will have to clarify the legal status of the Spratlys in generating maritime zones. This no doubt will help narrow down the dispute and facilitate its settlement.

4.4. Possible maritime delimitation method for overlapping between territorial sea and EEZ

Among the features of the Spratlys, the Fiery Cross Reef, Pearson Reef, Pigeon Reef, Barque Canada Reef, Mariveles Reef, Royal Charlotte Reef, Louisa Reef, Alicia Reef and Commodore Reef and two groups of features, namely the Union Reef and the Swallow Reef with some nearby low tide elevations, qualify under Article 121(1) but not Article 121(3), thus can only generate the internal water, territorial sea and contiguous zone.[563] However, as distance from some of these features to the coastal states is more than 48 nautical miles (the double breadth of the contiguous zone) but less than 224 nautical miles (the total breadth of a contiguous zone with a EEZ) overlapping among the territorial sea, contiguous zone and even internal water of these features with the EEZ of coastal states will likely occur in some areas, e.g. with the EEZ of Malaysia.[564]

In these situations, as the maritime zones are not of the same type and differ in their breadth, the equidistance principle cannot be applied in maritime delimitation. International law in maritime delimitation is also silent on this issue. However, from case law and state practice the "wrong side" island in maritime delimitation normally will not be given full effect. Particularly in the case of small and uninhabited islands like the features of the Spratlys, enclaving may be considered the proper solution for them in maritime

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the territorial dispute or delimitation of the continental shelf with the Russia Federation. For the summary of the recommendation of the Commission to Russian in the Report of the Secretary-General to the Fifty-seventh session of the General Assembly under the agenda item Oceans and the Law of the Sea, see A/57/57/Add.1 (paras.38-41), online at http://daccessdds.un.org/doc/UNDOC/GEN/N02/629/28/PDF/N0262928.pdf?OpenElement (accessed on 16 April 2006)
For a discussion on the consideration of the Commission together with the reaction of other states to the submission of Russia and Australia, see C. Johnson and A.G. Oude Elferink, "Submission to the Commission on the Limits of the Continental Shelf in the Cases of Unsolved Land and Maritime Dispute: The Significance of Article 76(10) of the Law of the Sea Convention", in David FreeStone, Richard Barnes and David Ong, *The Law of the Sea: Progress and Prospects,* (Oxford: Oxford University Press, 2006), p.161 at167-71 and 173-6.

[563] For details, see Section 5.2.2, Chapter 2, *supra.*

[564] For illustration on map, see Figure 31, *supra.*

delimitation, i.e. these features may be given maritime space of 12 nautical miles if their maritime zones are overlapping with the EEZ of the coastal states. This is also the suggested solution for maritime delimitation among the Spratlys' features between those who qualify under Article 121(1), i.e., only having internal water, territorial sea and contiguous zones and those who qualify under Article 121(3) as having an EEZ and continental shelf.

4.5. Some observations on the prospects of maritime delimitation in the South China Sea dispute

If the parties to the dispute agree with each other for a maritime delimitation in the Spratlys' waters of the South China Sea, the method and relevant circumstances which have been examined in this chapter may be applied for a prospect maritime delimitation process. This process may arrive at a prospect result as follows:

(1) A full effect of the mainland in any maritime delimitation between the Spratlys and the littoral states.

(2) Equidistance lines as maritime boundaries for any maritime delimitation among the Spratlys' features with the same effect in generating maritime zones, i.e. all qualify under Article 121(3) or 121(1).

(3) Enclaves for any maritime delimitation between the features of the Spratlys which only qualify under Article 121(1) with the EEZ and continental shelf of the mainland of littoral states or of other features of the Spratlys which qualify under Article 121(3).

However, the difficulties in settling the sovereignty issues also results in a deadlock in the maritime delimitation. The titles to the mainland of littoral states and islands of the Spratlys are the basis for generating maritime zones thus define and delimit the overlapping areas. Hence, as far as the sovereignty issues have not been solved, there is no definite maritime boundary for the maritime issues. There is only the possibility to facilitate the dispute settlement through clarifying some legal issues including primarily the validity of the outer edge of the continental shelf of Vietnam and Malaysia and possibly the ability of the Spratlys to generate maritime zones of the Commission on the Limits of the Continental Shelf, if Malaysia and Vietnam submit their delineation of the outer limit of the continental shelf to the Commission.

Although not having the effect of reducing maritime spaces which generated from the mainland of coastal states, the Spratlys will have a vital role for states to acquiring maritime zones in the shaded area (the maritime zones of the Spratlys after giving full effect to the mainlands of littoral states as in Figure 36, *supra*). This results from the 12 islands which may generate full maritime zones. Therefore, the next part of this chapter will take a closer look at how the entitlement over these islands affects the maritime delimitation result.

5. A closer look at the maritime delimitation prospect of the shaded area

5.1. The effect of the Spratlys' features in maritime delimitation

The effect of the Spratlys' features on maritime delimitation can be divided into two groups. Of 35 islands of the Spratlys resulted from the analysis of Chapter 2, 23 of Article 121(3) are able to generate only internal water and territorial sea. These islands (unless they overlap with each other) will be enclaves if they are located within the overlapping area, and thus they do not reduce much the maritime rights of littoral states. The major overlapping will be produced by 12 others (of Article 121(2)) which may generate full maritime zone.[565] From Chapter 3, Vietnam, China and Taiwan make their claims to all of them. The Philippines claims 10. Only Malaysia and Brunei did not claim any of the 12 islands. In fact, of these 12 islands, Vietnam occupies 5 (namely the Southeast Cay, Sand Cay, Nanyit Island, Spratly Island and Amboyna Cay), the Philippines occupy 6 (namely the Northeast Cay, Thitu Island, West York Island, Flat Island, Nanshan Island, and Loaita Island) and Taiwan occupies 1 (the Itu Aba Island).

Of the 12 islands which may generate full maritime zones, the Spratly Island and Amboyna Cay are further southward and excluded from the claim of the Philippines. Both of them will create overlapping with maritime zones generated from the mainland of Vietnam, Malaysia and Brunei. In fact, according to the conclusions from the previous section, overlapping between maritime zones of the Spratlys' features and those generated from the mainland may result in the full effect of the mainland. However, any state which

[565] However, not all of them will produce significant overlapping for all littoral states as detail was examined in Section 3.3, *supra* and 12 is the maximum result of the application of Article 121(3) (See Chapter 2, Section 3.5, *supra*).

has entitlement to these two islands is still able to control a large maritime area in the south of the shaded area.

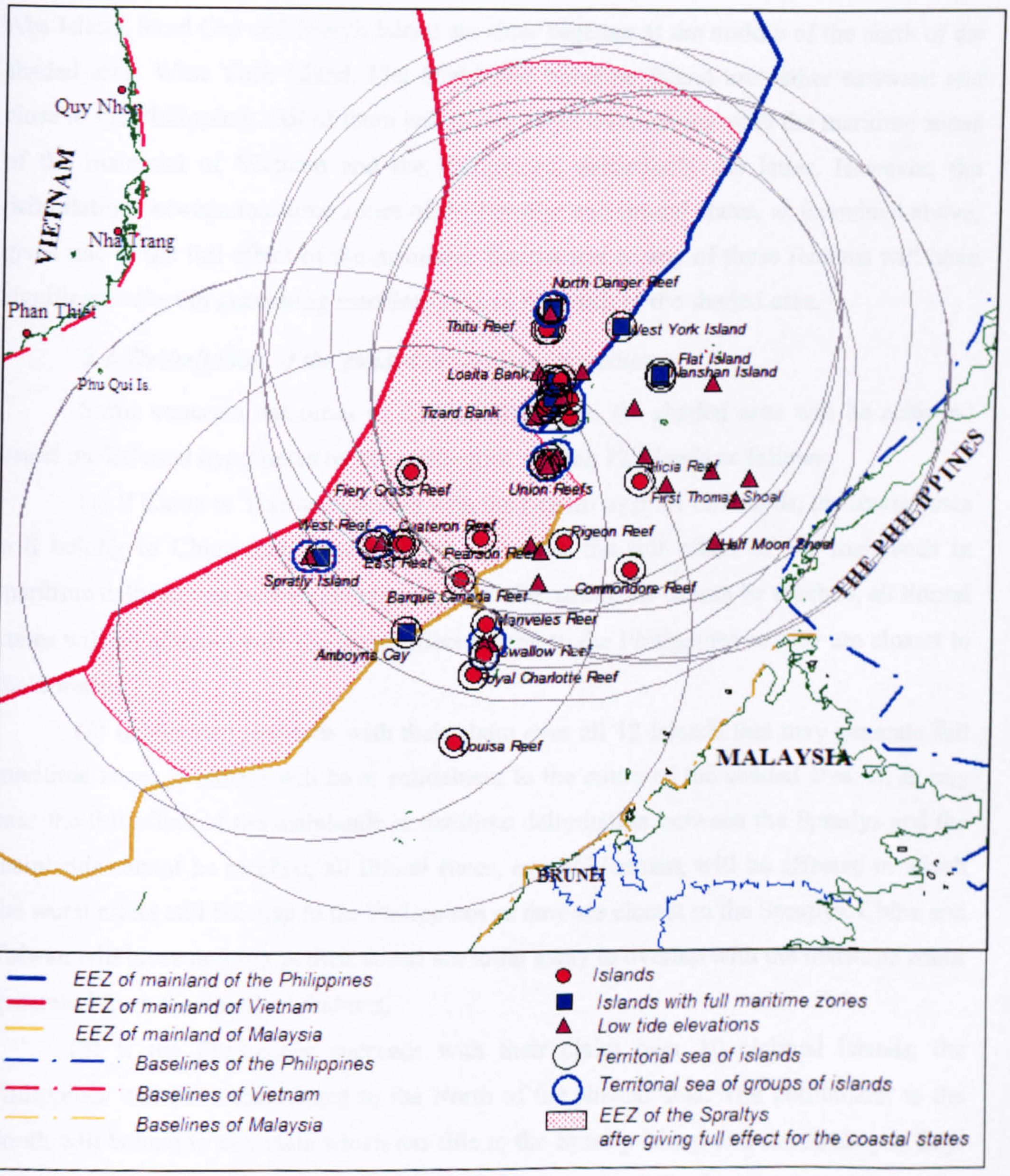

Figure 36. The shaded area (for EEZ)[566]

[566] Map drawn by Mapinfo.

The other ten islands are located in the central area, approximately midway between Vietnam and the Philippines. Northeast Cay, Southeast Cay, Thitu Island, Loaita Island, Itu Aba Island, Sand Cay and Nanyit Island are close together at the middle of the north of the shaded area. West York Island, Flat Island and Nanshan Island are rather eastward and close to the Philippines. All of them will create major overlapping with the maritime zones of the mainland of Vietnam and the Philippines, particularly the latter. However, the delimitation between maritime zones of the Spratlys and littoral states, as examined above, gives rise to the full effect of the mainland. Entitlement to any of these features will have significant effect in generating maritime zone in the north of the shaded area.

5.2. Delimitation of the shaded area: Some hypotheses

Some concrete outcomes of the delimitation in the shaded area will be achieved based on different hypotheses on the entitlement of such 12 islands as follows:

(1) If China or Taiwan succeeds with their claim over all 12 islands, the shaded area will belong to China and Taiwan. If, in any case, the full effect of the mainlands in maritime delimitation between the Spratlys and the mainlands cannot be reached, all littoral states will be affected with the worst effect belong to the Philippines as they are closest to the Spratlys.

(2) If Vietnam succeeds with their claim over all 12 islands that may generate full maritime zones, Vietnam will have entitlement to the entire of the shaded area. If, in any case the full effect of the mainlands in maritime delimitation between the Spratlys and the mainlands cannot be reached, all littoral states, except Vietnam, will be affected in which the worst effect still belongs to the Philippines as they are closest to the Spratlys. China and Taiwan will loose nothing as their coasts are to far away to overlap with the maritime zones generated from the Spratlys' features.

(3) If the Philippines succeeds with their claim over 10 claimed islands, the Philippines will have entitlement to the North of the shaded area. The entitlement to the South will belong to any state which has title to the Spratly Island and the Amboyna Cay. Vietnam, China and Taiwan are all claimaints to these two islands. The delimitation line between the North and the South of the shaded area in this scenario will be the equidistance line of the most southward feature of the 10 islands, i.e. the Nanyit Island with the Spratly Island and the Amboyna Cay (the line named AB and BD respectively as illustrated in

Figures 37 below). On the basis of the entitlement to the Spratly Island and the Amboyna Cay, the southern area may belong to one party (either Vietnam, China or Taiwan) or may be further divided into two (any two of the three parties if each of them only has title to one island). Again, in this case equidistance line will be applied (the line named CE as illustrated in Figure 37 below).

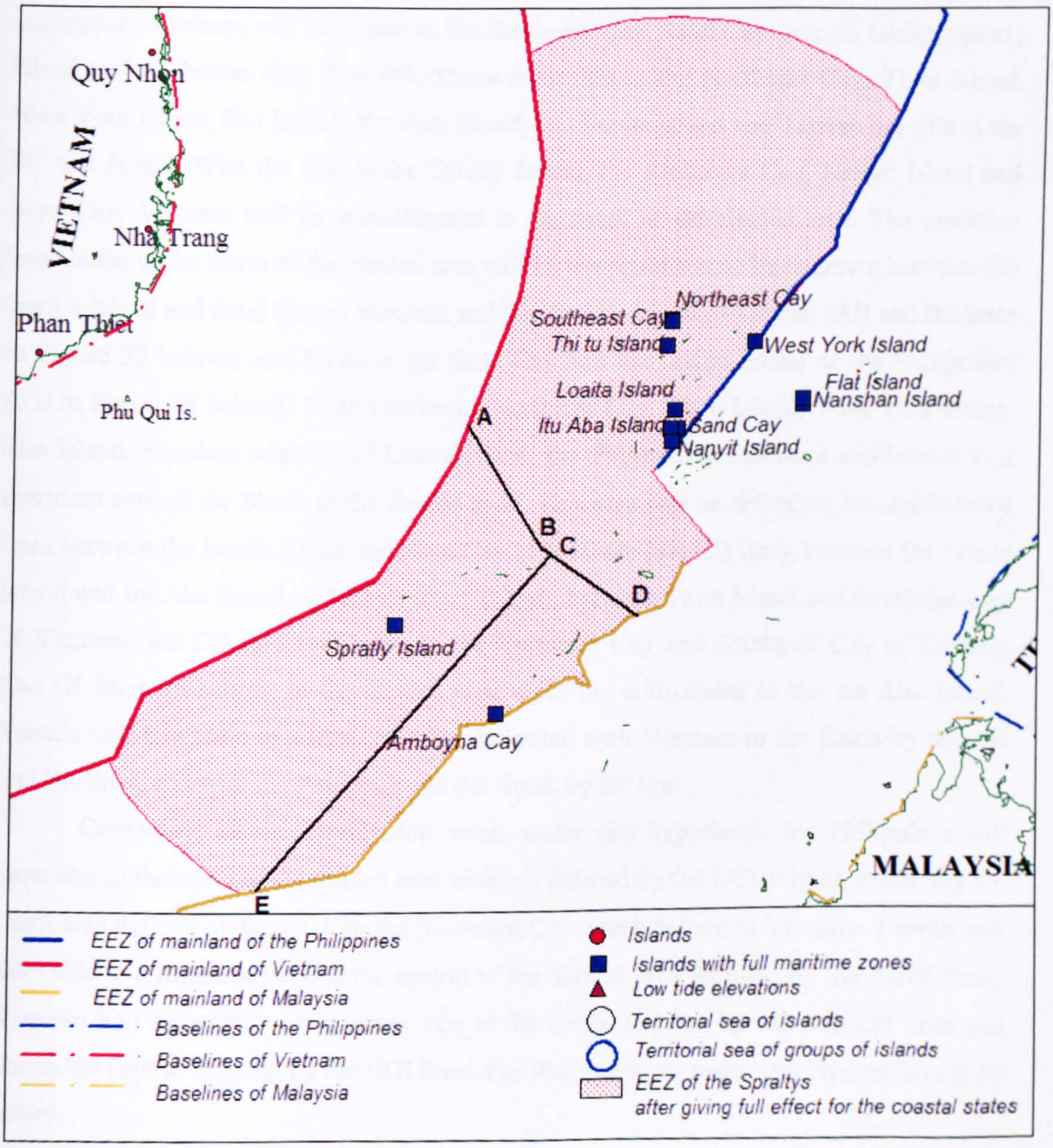

Figure 37. Maritime delimitation for the shaded area with the hypothesis that the claim of the Philippines succeeds[567]

[567] Map drawn by Mapinfo.

If, in any case, the full effect of the mainlands in maritime delimitation between the Spratlys and the mainlands cannot be reached, Vietnam, Malaysia and Brunei will be affected, in which the worst effect will be towards Malaysia and Brunei as they are the closest states to Amboyna Cay.

(4) If the entitlement to the 12 islands is divided according to the current situation of occupation, Vietnam will have title to the Southeast Cay, Sand Cay, Nanyit Island, Spratly Island and Amboyna Cay. The Philippines have title to the Northeast Cay, Thitu Island, West York Island, Flat Island, Nanshan Island, and Loaita Island and Taiwan has title to the Itu Aba Island. With the title to the Spratly Island, the Amboyna Cay, Nanyit Island and Sand Cay, Vietnam will have entitlement to the south of the shaded area. The maritime boundaries in the south of the shaded area will be the equidistance lines drawn between the Nanyit Island and Sand Cay of Vietnam and the Itu Aba Island of Taiwan (AB and BE lines in Figure 38 below), and between the Sand Cay and the Loaita Island of the Philippines (CD in Figure 38 below). With title to the Northeast Cay, Thitu Island, West York Island, Flat Island, Nanshan Island, and Loaita Island, the Philippines will have entitlement to a maritime zone at the North of the shaded zone. This area will be delimited by equidistance lines between the Loaita Island and Sand Cay of Vietnam (the CD line), between the Loaita Island and Itu Aba Island of Taiwan (the CF line), between Thitu Island and Southeast Cay of Vietnam (the GH line) and between the Northeast Cay and Southeast Cay of Vietnam (the GI line). In central of the shaded area, with the entitlement to the Itu Aba Island, Taiwan will have title to a maritime area delimited with Vietnam in the South by the AB and BE lines, and with the Philippines in the North by EF line.

Combining all the delimitation result, under this hypothesis, the Philippines will have title to the north of the shaded area which is defined by the DCEF lines, excluding the small area defined by the HGI for the Southeast Cay which belong to Vietnam. Taiwan will have title to a maritime zone at the central of the shaded area defining by the ABEF lines. Vietnam will have title to two zones, one in the south defining by the ABECD lines and one in the central defining by the HGI lines. For illustration on maps, see Figures 38 and 39 below.

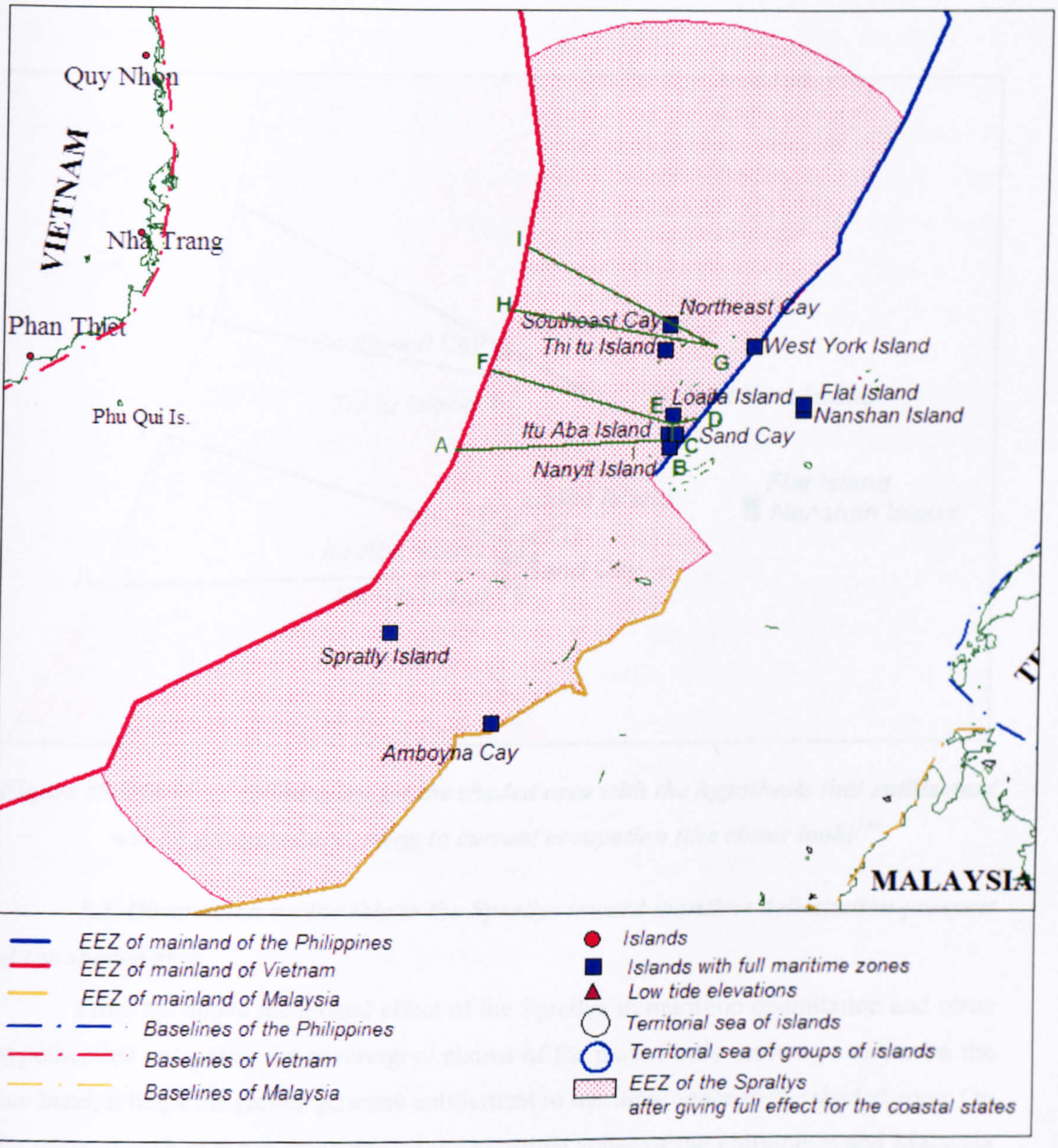

Figure 38. Maritime delimitation for the shaded area with the hypothesis that entitlement will be generated according to current occupation (the overview of the area)[568]

[568] Map drawn by Mapinfo.

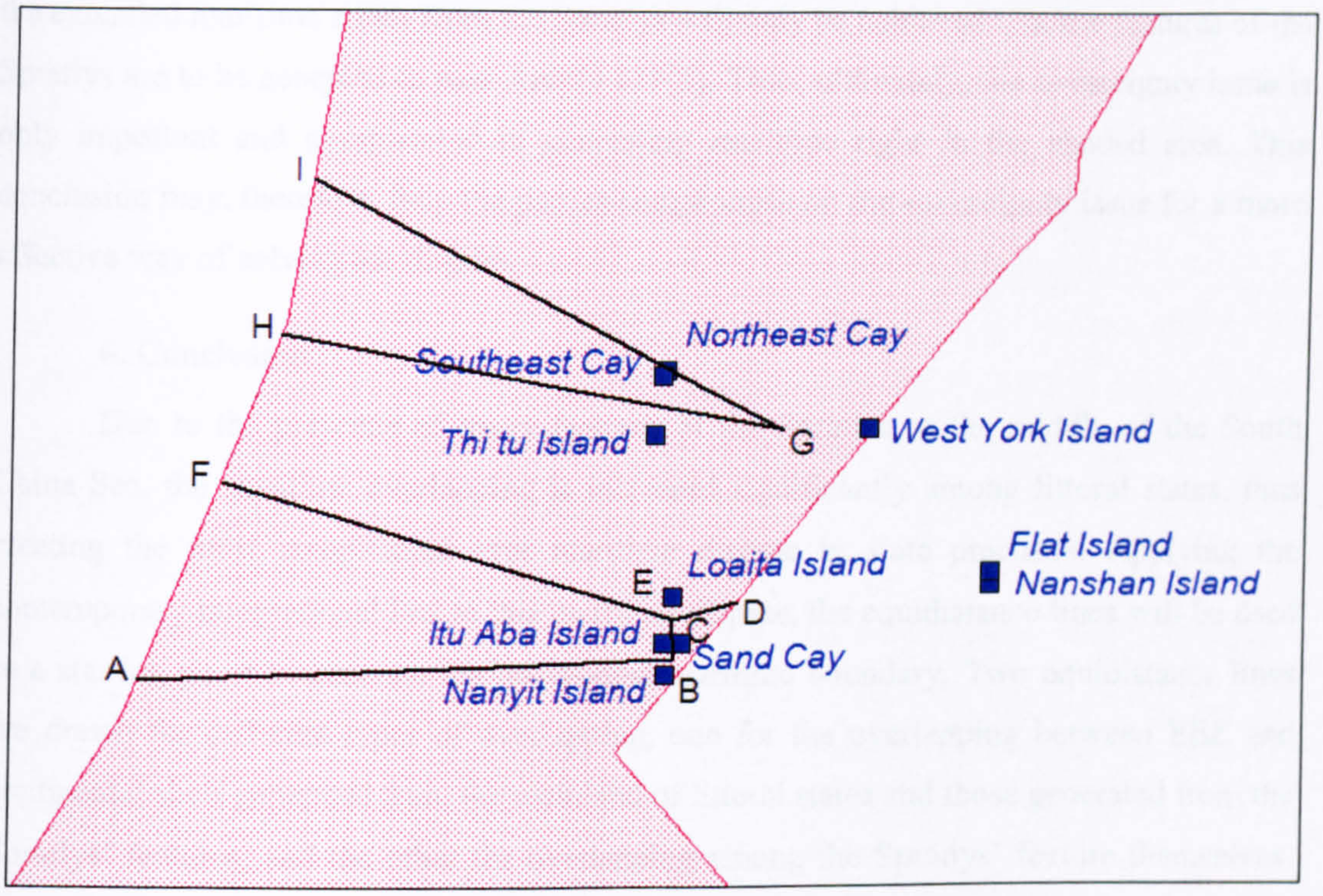

Figure 39. Maritime delimitation for the shaded area with the hypothesis that entitlement will be generated according to current occupation (the closer look)[569]

5.3. Observation on the title to the Spratlys toward maritime delimitation prospect of the shaded area

From the above mentioned effect of the Spratlys in maritime delimitation and some hypothesised outcomes, the sovereignty claims of the parties only serve two roles. On the one hand, it helps the parties generate entitlement to maritime space in the shaded zone. On the other, it enables the encroaching on the maritime zones of the Philippines and Malaysia by the enclaving of some Article 121(3) islands. Thereby, with no Article 121(3) island located in their EEZ from the mainland, Vietnam, China and Taiwan will loose nothing from their maritime zone which is generated from their mainlands, but only gain more from any title established to the Spratlys' features. Only Malaysia, Brunei and the Philippines may loose some maritime zone due to the enclaving of some Article 121(3) features of the Spratlys, but the loss is not much. However, they can also gain some more maritime space

[569] Map drawn by Mapinfo.

if they are successful with their sovereignty claims to some of the Spratlys. However, all the extended maritime zones from the Spratlys will only be achieved if some features of the Spratlys are to be accepted to pass Article 121(3). Thus, ultimately, the sovereignty issue is only important and complicated in generating maritime right in the shaded area. This conclusion may, therefore, help the parties compromise on the sovereignty issue for a more effective way of solving the dispute.

6. Conclusion

Due to the presence of many features of the Spratlys in the middle of the South China Sea, the maritime overlapping is increased significantly among littoral states, thus creating the most complicated ever maritime dispute in state practices. Applying the contemporary international law to this maritime dispute, the equidistance lines will be used as a starting point to generate the provisional maritime boundary. Two equidistance lines are drawn for different types of overlapping, one for the overlapping between EEZ and continental shelf generated from the mainland of littoral states and those generated from the Spratlys' features, and the other for overlapping among the Spratlys' feature themselves. Thereafter, all relevant circumstances in the maritime delimitation will be taken into account to adjust the meridian line for an equitable result. Although many circumstances may be claimed to be relevant in maritime delimitation of the South China Sea dispute, such as the presence of tiny islands, the access to the fishery and hydrocarbon resources, the security interests of coastal states, navigation interests in the South China Sea and the historic title of China and the Philippines, the actual relevant circumstance in maritime delimitation between the mainland and the Spratlys may only be the presence of the tiny and uninhabited islands of the Spratlys. Examination of state practices and judgments of the ICJ shows that in most of the cases, tiny islands which located on the wrong side have a maximum of half effect or are even ignored in order to maintain the equitable result for the maritime delimitation. The maritime delimitation in the South China Sea may not be an exception to this trend, thus the islands of the Spratlys are likely to give a reduced effect in maritime delimitation. Hence, coastal states may still have full maritime space in maritime delimitation with the Spratlys. Notwithstanding, the reduced effect of the Spratlys' features is not applied to the maritime delimitation among themselves. Therefore, equidistance line will likely be the maritime boundaries for delimitation in the shaded area.

As the sovereignty issue in the South China Sea dispute is unlikely to be solved in the short term, there is no definite maritime boundary for the maritime issues. However, from the analysis for a prospect maritime delimitation of Spratlys waters of the South China Sea, the actual role of the Spratlys in maritime delimitation was identified. The Spratlys will not have the effect to reduce the maritime zone generated from the entitlement of the mainland of littoral states. They only have the effect to generate maritime zone in the shaded area. This clarification may help reducing the illusion of the parties toward the ability to generate maritime zones of the Spratlys. This also clarifies that with the maximum approach taken from Chapter 2 that some of the features of the Spratlys may generate full maritime zone, there is no high sea in the South China Sea, thus limits the number of the parties concerned.

Based on a prospect maritime delimitation, the complicated issue concerning maritime delimitation is to delimit the shaded area. Currently, while waiting for a permanent solution to the sovereignty issue which is no doubt not easy to be reached in the coming time, the parties concerned may agree to negotiate some kind of cooperation for this area in order to better management the South China Sea. The next chapter will bring the analysis of the sovereignty and maritime issues forward to examine all available feasible solutions for the South China Sea dispute.

CHAPTER 5. JUDICIAL OR DIPLOMATIC METHODS: THE FEASIBLE SOLUTIONS TO THE SOUTH CHINA SEA DISPUTE

1. Introduction

Analysis in the previous chapters shows that the core of the South China Sea dispute is the entitlement to 12 features of the Spratlys which may generate full maritime zones in the shaded zone for the parties. A prospect of maritime delimitation will arrive at the full effect for the mainland of littoral states in generating maritime zone and the use of equidistance line as maritime boundaries in the shaded area (with the hypothesis that the Spratlys' features belong to different jurisdictions). However, since the sovereignty issue has yet to be resolved, no definite solution for maritime delimitation is available either.

In order to settle a dispute, Article 33(1) of the UN Charter provides a list of dispute settlement means including negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements. These peaceful means can be classified into two groups, namely settlement through judicial institutions and diplomatic measures. This chapter will examine the prospects of these methods in settling the South China Sea dispute.

2. Judicial method: The possibility of using an arbitration constituted under Annex VII of the LOSC

2.1. The impossibility of jurisdiction of the ICJ and international arbitration

The ICJ and international arbitration have jurisdiction over a dispute on the basis of the consent of the states concerned. Consent can be given by a means of a compromissory clause in a treaty or a declaration, e.g. under Article 36(2) of the ICJ Statute. Alternatively, parties to a dispute may also give their consent through a special agreement or an arbitration *compromis* in response to a particular dispute.[570]

In the South China Sea dispute, the strategic positions of the Paracels and Spratlys and other interests from their surrounding waters are of crucial importance and the parties are aware of the weaknesses in their arguments. Thus, the parties are in favour of keeping

[570] John Merrills, *International Dispute Settlement,* (Cambridge: Cambridge University Press, 2005), p.127-130.

the *status quo* of the dispute rather than submitting the dispute to any judicial settlement mechanism in order to face the risk of becoming a loser.

China usually states that the country has strong evidence to prove its sovereignty over both archipelagos. It also has an advantage of having a better understanding of the procedures of the ICJ by having a representative judge at this Court. However, China has still not accepted the Court's jurisdiction over the South China Sea dispute. The Philippines, which can be considered radical in the region with its general acceptance of the Court's jurisdiction since 1972, however, entered a reservation regarding the South China Sea dispute.[571] Taiwan has not yet been recognised as a state, and so cannot use the ICJ jurisdiction. Malaysia and Brunei which are considered as having weak arguments in the case also seemingly never want to invoke the ICJ procedure to solve this dispute. Only Vietnam expresses its willingness to the judicial settlement mechanism.[572] In addition, the parties have not reached (and possibly will never reach) any special agreement to submit the dispute to any judicial settlement mechanisms. Lacking the consent of the parties, the ICJ and international arbitration will not have any jurisdiction over the South China Sea dispute.

2.2. Dispute settlement under Part XV of the LOSC

The fact that only Vietnam was willing to submit the South China Sea dispute to a judicial institution would not rule out the possibility of settling the dispute by judicial method. The recent award of the *Barbados v. Trinidad and Tobago* case proved the success of the unilateral submission of Barbados thus settling its dispute, concerning maritime delimitation with Trinidad and Tobago, by means of a tribunal constituted under Annex VII of the 1982 LOSC.

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[571] The Declaration of the Philippines to the jurisdiction of the ICJ states that
"Provided, that this declaration shall not apply to any dispute
...
e. arising out of or concerning jurisdiction or rights claimed or exercised by the Philippines
i. in respect of the natural resources, including living organisms belonging to sedentary species, of the sea-bed and subsoil of the continental shelf of the Philippines, or its analogue in an archipelago, as described in Proclamation No. 370 dated 20 March 1968 of the President of the Republic of the Philippines; or
ii. in respect of the territory of the Republic of the Philippines, including its territorial seas and inland waters;"

[572] Chemillier-Gendreau, Monique, *op.cit.*, note 35, p.133. Also, in a private interview with Valencia, an official of the Vietnamese government confirmed this position, for details, see Valencia *et al.*, *op.cit.*, note 16, p.33.

A tribunal constituted under Annex VII is one of the dispute settlement methods which are provided at Part XV of the 1982 LOSC.[573] Reference to international law concerning dispute settlement, Section 1 of Part XV requires the parties to the 1982 LOSC to settle their dispute by peaceful means according to their choice. Section 2 of Part XV provides for compulsory procedures entailing binding decisions if the parties fail to reach settlement under Section 1. However, the freedom of the parties is still ensured as Article 287 in Section 2 allows parties the choice of forum, including the International Tribunal for the Law of the Sea (ITLOS), the ICJ, the Arbitral Tribunal and the Special Arbitral Tribunal. In theory, if the parties do not choose their forum, any procedure may be used. However, the ICJ, ITLOS, and Arbitral Tribunal have contentious jurisdiction, thus do not have jurisdiction over a dispute without the consent of the parties. In this regard, the Arbitral Tribunal is the only means which may be used if the parties did not make their choice under Article 287. Article 298 further offers states the opportunity to make optional written declaration excluding the operation of procedures provided for in Section 2. Accordingly,

> when signing, ratifying or acceding to this Convention or at any time thereafter, a state may, without prejudice to the obligations arising under section 1, declare in writing that it does not accept any one or more of the procedures provided for in section 2 with respect to one or more of the following categories disputes:
> (a) (i) disputes concerning the interpretation or application of articles 15, 74 and 83 relating to sea boundary delimitations, or those involving historic bays or titles, provided that a state having made such a declaration shall, when such a dispute arises subsequent to the entry into force of this Convention and where no agreement within a reasonable period of time is reached in negotiations between the parties, at the request of any party to the dispute, accept submission of the matter to conciliation under Annex V, section 2; and provided further that any dispute that necessarily involves the concurrent consideration of any unsettled

[573] For further discussion on the dispute settlement mechanism of the 1982 LOSC, see John Merrills, *op.cit.*, note 570, Chapter 8, p.182; Robin Churchill, "Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea Convention during its First Decade" in FreeStone, D., Barnes, R. and Ong, D. (eds.), *The Law of the Sea: Progress and Prospects,* (Oxford: Oxford University Press, 2006), p.388; Natalie Klein, *Dispute Settlement in the UN Convention on the Law of the Sea,* (Cambridge: Cambridge University Press, 2005); J Collier and A.V. Lowe, *The Settlement of Disputes in International Law: Institutions and Procedures,* (Oxford: Oxford University Press, 1999), Chapter 4; E.D Brown, "Dispute Settlement and the Law of the Sea: the UN Convention Regime" (1997) 21(1) *Marine Policy* 17; Alan E. Boyle, "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction" (1997) 46(1) *ICLQ* 37; Jonathan I. Charney, "The Implications of Expanding International Dispute Settlement Systems: the 1982 Convention on the Law of the Sea" (1996) 90 *AJIL* 69; Shigeru Oda, "Dispute Settlement Prospects in the Law of the Sea" (1995) 44(4) *ICLQ* 863; and A.O. Adede, *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and A Commentary,* (Dordrecht, Boston and Lancaster: Martinus Nijhoff Publishers, 1987).

dispute concerning sovereignty or other rights over continental or insular land territory shall be excluded from such submission;
(ii) after the conciliation commission has presented its report, which shall state the reasons on which it is based, the parties shall negotiate an agreement on the basis of that report; if these negotiations do not result in an agreement, the parties shall, by mutual consent, submit the question to one of the procedures provided for in section 2, unless, the parties otherwise agree;
(iii) this subparagraph does not apply to any sea boundary dispute finally settled by an arrangement between the parties, or to any such dispute which is to be settled in accordance with a bilateral or multilateral agreement binding upon those parties;

If a party fails to make declaration under this article, it will be bound by the decision of the procedure of Section 2 without any limitations.

In the *Barbados v. Trinidad and Tobago* case, Trinidad and Tobago did not make their choice under Article 287 and did not declare any limitation under Article 298, therefore, they had to agree to settle their dispute by the binding decision of an arbitral tribunal in accordance with Annex VII without any limitations other than those inherent in the terms of Part XV and Annex VII.[574] This precedent could have been applied to the South China Sea dispute as until August 2006 the parties to the South China Sea dispute had not made their choice of forum under Article 287 and had not declared limitation under Article 298. Unfortunately, the precedent of the *Barbados v. Trinidad and Tobago* case made the parties in the South China Sea vigilant. Four months after the Award of Barbados v. Trinidad and Tobago was held, China made their declaration proclaiming that "China does not accept any of the procedures provided for in Section 2 of Part XV of the Convention with respect to all the categories of disputes referred to in paragraph 1 (a) (b) and (c) of Article 298 of the Convention".[575] This declaration ruled out the possibility of using unilateral submission and a chance was missed for settling the South China Sea dispute by a judicial institution. Notwithstanding the limitation of Article 298 on judicial settlement, the point (a)(i) of the article provides that a state that makes declaration under the article is still bound to accept compulsory conciliation.[576] If conciliation is unsuccessful the parties have to submit the dispute to one of the compulsory settlement procedures unless they agree on some other procedure. Unfortunately, this compulsory provision once again opts out delimitation

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[574] *Barbados v. Trinidad and Tobago* Award, 2006, paras.191-217.
[575] The declaration of China was made on 25 August 2006. For full text see http://www.un.org/Depts/los/convention_agreements/convention_declarations.htm#China%20Upon%20ratification (accessed on 20 July 2007)
[576] Procedure for compulsory conciliation is provided at Annex V of the 1982 LOSC.

disputes involving questions of title to territory. Therefore, compulsory conciliation cannot be applied to the South China Sea dispute either.[577]

However, the dispute settlement mechanism of the 1982 LOSC may still be useful in facilitating the dispute settlement. It may help narrow the differences of the parties in application of the 1982 LOSC in the South China Sea dispute, such as the application of Article 121(3) (which plays a key role in defining the status of the Spratlys), the application of straight baseline and the application of the outer limit of the continental shelf. The correct application of these issues will help generate the exactly overlapping maritime zones in the region, thus facilitate the dispute settlement. Also, if the parties in the dispute agree to pool their sovereignty for joint development in certain areas of the South China Sea, the tribunal can also play a helpful role in defining the joint development area.[578]

In addition, if a cooperation mechanism is established, the dispute settlement of the 1982 LOSC, particularly the special arbitral tribunal under Annex VIII, may provide an effective dispute settlement mechanism for any dispute emerging during the cooperation process. The fields which fall under jurisdiction of a special arbitral tribunal instituted under Annex VIII, namely disputes concerning the interpretation or application of the articles of 1982 LOSC relating to (1) fisheries, (2) protection and preservation of the marine environment, (3) marine scientific research, or (4) navigation, including pollution from vessels and by dumping[579] are vital for any cooperation regime in a semi-enclosed sea like the South China Sea.[580]

Being members to the 1982 LOSC, all littoral states in the South China Sea are bound by the obligation of the Convention, in which dispute settlement mechanism is one of the novel issues that the parties have both rights and obligation to invoke to settle their maritime dispute. Making use of this mechanism will certainly facilitate the parties to settle the South China Sea dispute.

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[577] Collier and Lowe made a conclusion that delimitation disputes involving question of title to territory may be excluded entirely from the compulsory settlement procedures under the provision of Article 298(1)(a) of the 1982 LOSC. See John Collier and Vaughan Lowe, *The Settlement of Dispute in International Law*, (Oxford: Oxford University Press, 1999), p.93, fn53.

[578] In the *Barbados v. Trinidad and Tobago* case, Barbados raised a request for a fishery regime. However, the Tribunal held that as neither of the parties directed a dispute over their respective rights and duties in respect of fisheries, the Tribunal did not have jurisdiction on this issue (Paras.276-7 of the Award). Thus, it is submitted that if the parties had agreed to submit the issue related to the limit of a cooperation boundary to the Tribunal, the Tribunal would had jurisdiction on this issue.

[579] These fields are provided under Article 1 of Annex VIII of the 1982 LOSC.

[580] For further discussion on a prospective cooperation regime, see *infra* this chapter.

2.3. The authority of the Commission on the Limits of the Continental Shelf (CLCS) under Article 76 of the 1982 LOSC

In addition to the provision of Part XV, Article 76 of the 1982 LOSC also provides a mechanism under the CLCS in which, indirectly, the continental shelf of coastal states will be reviewed. By providing a recommendation for a legitimate outer limit of the continental shelf, to some extent, the review of the CLCS will facilitate the delimitation of the overlapping continental shelves.

Article 76 lays out the method to measure the continental shelf in which normally the width of the continental shelf is 200 nautical miles, but in the special case where the natural prolongation of the seabed is beyond 200 nautical miles, subjected to certain geographical conditions, the width of the continental shelf can be extended to a maximum of 350 nautical miles from a state's baseline or 100 nautical miles from the 2,500 metre isobath.[581] In these cases, paragraph 8 of Article 76 requires that information on the continental shelf beyond 200 nautical miles shall be submitted to the CLCS. The CLCS in its turn shall make recommendations to coastal states on the matter of establishment of the outer limit of the continental shelf. The limit of the continental shelf, established on the basis of the recommendation, shall be final and binding.[582]

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[581] Article 76, paras.4, 5 and 6 of the 1982 LOSC. The geographical conditions required for the outer limit of the continental shelf are listed under paragraph 4 that: "(i) a line connecting the outermost points where the 'thickness of sedimentary rocks is at least one percent of the shortest distance from such point to the foot of the continental slope', or (ii) a line connecting points 'not more than 60 nautical miles from the foot of the continental slope'". For discussion of the application of these technical requirements, see United Nations, *The Law of the Sea: Definition of the Continental Shelf: An Examination the Relevant Provisions of the United Nations Convention on the Law of the Sea,* (New York: UN publication, 1993), Cook, P.J and C. Carleton (eds.), *Continental Shelf Limits: The Scientific and Legal Interface,* (Oxford: Oxford University Press, 2000) and Ron Macnab, "The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76" (2004) 35(1) *ODIL,* 1 at 2-7.

[582] The full text of Article 76(8) provides that: "Information on the limits of the continental shelf beyond 200 nautical miles from the baselines from which the breadth of the territorial sea is measured shall be submitted by the coastal state to the Commission on the Limits of the Continental Shelf set up under Annex II on the basis of equitable geographic representation. The Commission shall make recommendations to coastal States on matters related to the establishment of the outer limits of their continental shelf. The limits of the shelf established by a coastal state on the basis of these recommendations shall be final and binding." Annex II of the Convention provides further detail on the structure and functions of the Commission that the Commission is to be composed of an elected group of 21 technical specialists which have the following functions:

(a) to consider the data and other material submitted by coastal states concerning the outer limits of the continental shelf in areas where those limits extend beyond 200 nautical miles, and to make recommendations in accordance with Article 76 and the Statement of Understanding adopted on 29 August 1980 by the Third United Nations Conference on the Law of the Sea;
(b) to provide scientific and technical advice, if requested by the coastal state concerned during the preparation of the data referred to in subparagraph (a).

The procedure by which the CLCS makes recommendations based on the information from the coastal states is elaborated on in Annex II of the 1982 LOSC and the Rules of Procedure.[583] Accordingly, the member states which generate a continental shelf beyond 200 nautical miles must submit the information of the outer limit of their continental shelf to the CLCS as soon as possible but, in any case, within 10 years of entry into force of the Convention for that state.[584] Taking into account the difficulties that developing states are facing in preparing the information for submission, at the 11th meeting of member states to the Convention in 2001, the parties agreed that for state parties for which the Convention enters into force before 13 May 1999, the 10-year time shall be taken as commencing on that date.[585] A subcommission, which is established for each submission and consists of seven members, subject to the information submitted by coastal states will make recommendations on the limit of the continental shelf.[586] The recommendation of the subcommission will be approved by the two-third majority vote of the members of the CLCS.[587] If the coastal state does not agree with the recommendation, it may make a revised or new submission to the CLCS within a reasonable time.[588]

In the case that the consideration of the subcommission and CLCS is related to land and maritime dispute, such consideration will not be dealt with in the dispute, unless the

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With regard to the stipulation that the recommendation of the Commission will be final and binding, there were some concerns as to whom the recommendation will have such effect. Ted L. McDorman analysed the states' opinions during the third UNCLOS in 1980 and opinions from scholars and concluded that the more convincing interpretation of "final and binding" is that it refers only to the submitting state in that the submitting state, having delineated its outer limit of the continental shelf and that limit having not being challenged by other states, cannot subsequently change the location of its outer limit. To this extent, and this extent only, would the outer limit be "final and binding", not be contestable and perhaps become an obligation *erga omnes*. For detail of the discussion, see Ted L. McDorman, "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World" (2002) 17(3) *IJMCL*, 301 at 313-7.

[583] Rules and Procedure of the Commission on the Limits of the Continental Shelf (hereafter Rules and Procedure), Doc. CLCS/40 of 2 July 2004.

[584] Article 4 of Annex II of the 1982 LOSC.

[585] Decision regarding the date of commencement of the ten-year period for making submissions to the Commission on the Limits of the Continental Shelf set out in Article 4 of Annex II to the LOSC, Doc, SPLOS/72 on 29 May 2001, para.(a).

[586] Members of the subcommission as well as of the Commission are drawn exclusively from states that have ratified the Convention. The CLCS consists of 21 elected experts in the fields of geology, geophysics, or hydrography, who serve in their private capacities. Members are elected for five-year terms. In principle, members may be nominated by any state party, but in practice, individual member nominations tend to originate from each nominee's home state. For discussion on the qualification of members of the Commission and the choice from states, see Neol Newton St. Claver Francis, "The Continental Shelf Commission" in Myron H. Nordquist & John Norton Moore (eds.), *Oceans Policy : New Institutions, Challenges and Opportunities,* (The Hague : M. Nijhoff, 1999), p. 141-145.

[587] Article 3, 4 of Annex II of the 1982 LOSC.

[588] Article 8, *ibid.*

parties concerned have given their prior consent.[589] Both paragraph 10 of Article 76 and Article 9 of Annex II of the 1982 LOSC state that the consideration of the Commission on the limits of the continental shelf shall not prejudice matters relating to delimitation of boundaries between states with opposite or adjacent coasts.[590] In fact, if any state submits the information of its continental shelf limits including the limit of overlapping areas to the CLCS, the other states concerned, due to related interests in the overlapping areas have to raise their voice at the CLCS to protect their rights. Precedents from the three submissions before the CLCS recorded no such consent for the review of the CLCS. Third parties only react to express their point of view that the recommendation made by the CLCS is without prejudice to the eventual delimitation among them.[591] As a result of the opposition of the third parties, the CLCS advises the submission state to revise its submission in a manner that does affect the overlapping areas.[592] Although it cannot delimit the maritime overlapping unless the parties give their consent, the review by the CLCS will facilitate the delimitation process by creating certainty about the legitimate location of the outer limit of continental shelf for the parties in a dispute, in the case that such limit extends beyond 200 nautical miles.

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[589] The procedure for giving consent is provided in Paras.4 and 5 of the Annex I to the Rules and Procedure. Accordingly, the Commission's basic position regarding submission where a land or maritime dispute exists is that it will not consider and qualify them, unless all states that are parties to the dispute have given their prior consent.

[590] Indeed, the CLCS does not have a similar role to an arbitrator or judicial institution. Also, during the negotiation of the UNCLOS, the negotiators were unable to reach a consensus on how Article 76 on the Commission and the dispute settlement provisions were to interrelate, thus the result brought no explicit wording in either Part XV or Article 76 on the relationship. In addition, this distinction is verified by other provisions of the 1982 LOSC such as Article 83 which specifically articulates the means by which continental shelf delimitation between opposite or adjacent states is to be addressed and Article 134(4) which also reinforces the distinction by providing that the provisions of Part XI are not to affect the establishment of the outer limits of the continental shelf in accordance with Part VI of the Convention or the validity of delimitation agreement between states. For further discussion, see Ted L. McDorman, *op.cit.*, note 582, p.312 and 317 and Nordquist, *A Commentary,* (The Hague: Martinus Nijhoff Publishers, Vol.II), p.883.

[591] So far, Russia, Brazil, Australia, Ireland, New Zealand, France, Ireland, Spain and the United Kingdom of Great Britain and Northern Ireland have made submissions under Article 76(8) to the Commission. Their submissions include the limit of overlapping areas, thus drawing the attention of neighbouring countries. In the case of Russia, five states, namely Canada, Denmark, Japan, Norway and the United States, have expressed their reaction to the Commission. For details of the submission and the reaction, see website of the CLSC: http://www.un.org/depts/los/clcs_new/clcs_home.htm (accessed on 26 February 2006) and C. Johnson and A.G. Oude Elferink, "Submission to the CLCS in Cases of Unresolved Land and Maritime Dispute: The Significance of Article 76(10) of the LOS Convention", in David FreeStone, Richard Barnes and David Ong, *The Law of the Sea: Progress and Prospects,* (Oxford: Oxford University Press, 2006), p.161 at 167-78.

[592] For example, the CLCS recommended that the Russian Federation made its best efforts to effect an agreement with Japan in accordance with paragraph 4 of Annex I to the Rules and Procedure of the Commission. For detail, see C. Johnson and A.G. Oude Elferink, *ibid,* p.171.

In the South China Sea case, as Vietnam, Malaysia and Brunei are likely to be able to extend some parts of their continental shelves beyond 200 nautical miles, they are obliged to submit information on their continental shelf limits to the CLCS and establish their continental shelves according to its recommendation. However, the continental shelves of Malaysia and Vietnam are opposite and overlap and with the presence of the Spratlys, Vietnam and Brunei also have some overlapping continental shelve areas. The submission may also face reaction from China, Taiwan and the Philippines due to their maritime claims in the South China Sea. Thus, the CLCS will only have authority to examine the outer limits of their continental shelves in combination with the overlapping area if all parties agree. Otherwise, the CLCS may facilitate the settlement of the South China Sea dispute by its recommendation on the outer limit continental shelf of these countries.

3. Diplomatic method: Negotiation for a joint cooperation regime

As no judicial method will be applicable to settle the South China Sea dispute, diplomatic means will be the only way to help the party end their dispute. This method was used during the 1990s by the initiation of Indonesia.[593] Drawing the lessons from the diplomatic measures in the 1990s will ensure this method be applied more effectively in the future.

3.1. Lessons from the diplomatic measures in the 1990s

3.1.1. The South China Sea Workshops

In the 1980s, with more participants and the escalation of claims, the South China Sea dispute became a prominent issue which might pose threats to Southeast Asian security. The serious use of force in 1988 by China confirmed this concern. This situation gave rise to the need for confidence building and cooperation to diffuse the tension in the dispute. Under the sponsorship of Canada, Indonesia started its mediation role in the South China Sea dispute in 1989.[594] Three main objectives and modalities were set out for the

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[593] Although in the South China Sea dispute, Indonesia is not directly involved, it has indirect interests as it is claiming Natuna Islands which is near the Spratlys archipelago and its maritime zones are adjacent to the disputed area. Therefore, Indonesia was keen to play an active and objective role in diplomacy to mediate the dispute with the aim of helping parties concerned and keeping an eye on the dispute evolution and improve its own position in the region.

[594] Dr Hasjim Djalal, the ambassador of Indonesia to Canada, acknowledged the dangerous situation of the South China Sea dispute and understood how the dispute related to his country. He had an idea to convene

mediation process, namely, to promote dialogue and mutual understanding between the parties through the exchange of views and ideas; to encourage the parties concerned to seek solutions to their disputes by creating a conducive atmosphere; and to develop concrete cooperation on technical matters in which everyone would and could agree to cooperate.[595]

In order to reach these goals, the meetings were planned to be held informally and to avoid the sensitive territorial issues. After the first workshop, named the Workshop on Managing Potential Conflict in the South China Sea, was held in 1990 in Bali, almost annually and to early 2005, fourteen workshops have been convened in Indonesia.[596] The participants of these workshops reached a consensus that the South China Sea dispute should be settled peacefully and the use of force could not be considered as a means to solve the dispute. They also agreed to restrain their practices in order not to exacerbate the dispute. This then was considered as a guideline for the dispute settlement.[597] The participants in the workshops also decided to establish Technical Working Groups (TWG) on marine scientific research, marine environmental protection, safety of navigation and resources management and legal matters. The TWG consisting of technical experts, hold meetings annually from which research on a variety of projects has brought the discussions of the workshops into more substantive matters.[598]

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some informal meetings to discuss confidence building and cooperation. In 1989, while working together on a workshop on petroleum joint development in Southeast Asia, he met Professor Ian Townsend-Gault (Professor of the British Columbia University in Canada). The two developed Dr Djalal's idea into a proposal and submitted it to the Canadian Department of Foreign Affairs. This gave them the financial support for the first phase of the initiative in which Dr Djalal, under the authorisation of the Indonesian Foreign Minister, visited ASEAN members in 1989 to discuss his idea of holding informal meetings on the South China Sea dispute. The ideas received support from ASEAN member countries.

[595] Hasjim Djalal, "Indonesia and the South China Sea Initiative", (2001) (32) *ODIL*, 97-103 at 98.

[596] For time and dates of these workshops, see Annex 3, *infra*.

[597] The first workshop was held with ASEAN members to lay down the framework for later discussions. In the second, China, Vietnam, Taiwan and landlocked Laos were also invited. This workshop was especially important as China accepted to attend in a multilateral discussion, including Taiwan even though this was only an informal meeting. In this workshop, several issues were discussed including marine scientific research, marine environmental protection, safety of navigation and resources management. For detail, see Hasjim Djalal and Ian Townsend-Gault, "Preventive Diplomacy: Managing Potential Conflicts in the South China Sea" in Herding Cats (ed.), *Multiparty Mediation in a Complex World*, (United States Institute of Peace Press, 1999), p. 113 at 115.

[598] Two TWGs on marine Scientific Research and a TWG on Resource Assessment were established in the third workshop in 1992. Three other TWGs on Marine Environmental Protection, Legal Matters and Safety of Navigation were established in the fourth workshop in 1993.

The TWG on Marine Scientific Research had 6 meetings from 1993 to 1998. The meetings focused on three main issues namely biodiversity protection, study on tides and sea level changes and regional cooperation in the field of marine science data and information networks in the South China Sea. These topics were developed into projects and discussed under Group of Experts (GEM). Among them, the proposal for biodiversity protection was adopted in the 6th workshop in 1995.

3.1.2. The Code of Conduct

Also in an attempt to build trust and confidence among parties concerned in the South China Sea dispute, there was another process conducted in the framework of ASEAN in order to draft a Code of Conduct for the South China Sea. The idea of building a Code of Conduct for the South China Sea emerged from 1992 when China enacted its Law on the Territorial Sea and the Contiguous Zone and signed a contract with the US Crestone Oil Company. The law states that the territorial land of China includes "...the Dongsha (Pratas) Islands, the Xisha (Paracels) Islands, the Nansha (Spratlys) Islands and other islands that belong to the People's Republic of China".[599] China expressed its willingness to use navy forces to enforce the contract with Crestone in the area claimed as continental shelf of the mainland of Vietnam.[600] In reply to these aggressive acts of China, the foreign ministers of the member countries of ASEAN issued the Declaration on the South China Sea in July 1992 urging all the concerned parties to solve the dispute by peaceful means and to build a code of international conduct in the South China Sea.[601]

The TWG on Marine Environmental Protection had three meetings from 1994 to 1998. To work in further detail on the topic, the TWG established a group of experts and a training programme. The Group of Experts (GEM) had another meeting on environmental protection in 1997 and the Training Programme for ecosystem monitoring also was held in the same year.

The TWG on Resource Assessment convened twice in 1993 and 1998. The topic was divided into three study groups, namely a study group on geological basin, one on hard minerals and one on living resources. The three appointed coordinators to assist the study groups were Indonesia, Vietnam and Thailand respectively. The work of the first group resulted in the proposal to compile a database on non-living non-hydrocarbon resources of the South China Sea which was approved in the 9th workshop in 1998 and implemented in 1999. The second group faced difficulty due to the sensitive territorial and jurisdictional issues. The third group arrived at a proposal for stock assessment and an implementation programme which were later discussed at the joint meetings with the TWG on legal matters and the workshops.

The TWG on Safety Navigation met three times from 1995 to 1998 to discuss four main issues namely (1) cooperative efforts regarding hydrographic data and mapping; (2) developing a training programme for seafarers and mariners; (3) developing cooperative efforts against unlawful activities at sea and (4) developing cooperative efforts regarding environmental protection. These topics were then discussed in further detail under GEMs.

The last TWG, TWG on Legal Matters had five meetings from 1995 to 2000. They discussed a number of legal issues involving developing cooperative activities including the environmental legislation and zone of cooperation issues. These two issues were then discussed in more detail under a GEM and a study group.

For the statistics on time and places of the TWGs meetings, see Annex 4, *infra*.

[599] Article 2 of the Law on the Territorial Sea and the Contiguous Zone on February 25th 1992. For full text, see http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/CHN_1992_Law.pdf (accessed on 21 October 2005).

[600] For analysis on the China's practice, see *supra,* Chapter 1, Section 2.1.

[601] Paragraph 1 and 4 of the ASEAN Declaration on the South China Sea, Manila, Philippines, 22nd July 1992. For full text of the Declaration, see website of the ASEAN Secretariat: http://www.aseansec.org/3634.htm (accessed on 21 October 2005).

After the 1992 Declaration, the formulation and drafting of the Code of Conduct were discussed in the meetings of ASEAN Summit Meeting, ASEAN Ministerial Meeting, ASEAN Regional Forum (the ARF), the Workshops on Managing Potential Conflicts in the South China Sea and the TWG on Legal Matters. The discussion lasted seven years from 1992 to 1999. During the discussion, the two bilateral Codes of Conduct which China signed with the Philippines and Vietnam in 1995 were considered as an example of how the Code of Conduct for the South China Sea would be drafted.[602]

In 1999, the Philippines on behalf of ASEAN countries, prepared a draft to discuss along with the Chinese draft. However, differences in the positions of China and ASEAN led to the prolongation of the adoption of the Code until 4 November 2002 at the 8th ASEAN Summit.[603] The Code was not adopted with binding effect as expected, as it was only a recommendation under the name of the Declaration on the Code of Conduct (DOC). Although not legally binding, the DOC is considered a step forward in the establishment of the Code of Conduct in the South China Sea in the future.

3.1.3. Achievements and limitations of the diplomatic measures in the 1990s

Lasting for more than ten years, the South China Sea Workshops, initiated by Indonesia, have obtained encouraging achievements which help to increase the regional and international awareness of the South China Sea dispute, create a forum for parties concerned to exchange their points of view and build confidence towards each other, and promote many cooperation projects in the field of marine research and environmental protection among littoral states. The workshops are also successful in having the involvement of China in the multilateral negotiation process (although informally), thus leading to the concluding of the DOC.

However, due to the informality, the workshops only provide a forum for the exchange of viewpoints and discussion on how to cooperate, and lacks mechanisms for binding commitments and implementation. The parties attempted to foster cooperation,

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[602] The two Codes of Conduct were signed in August and November 1995 respectively.

[603] The two drafts contained some differences. China wanted the Code to apply to the Spratlys only and any solutions to the dispute should be dealt with through bilateral negotiations. While ASEAN members preferred that the Code would apply to both the Paracels and Spratlys and the dispute would be solved through multilateral negotiation. The ASEAN draft also emphasised refrain from inhabiting and erecting structures on presently inhabited islands, reefs, shoals, cays, and other features in the disputed area while China's draft was silent on this issue. For discussion, see Yann-huei Song, "Codes of conduct in the South China Sea and Taiwan's Stand" 24 (2000) *Marine Policy,* 449 at 445.

however, most of the issues were raised and concluded without any agreement. Despite the fact that the DOC was signed in 2002, infringement still incurs no punishment, except verbal oppose from other states. While the workshops were undertaken from 1991 with the participation of China since the second workshop and its idea for joint development, China still used force to occupy Mischief from the Philippines. It was this incident that ignited an arms race, especially for the navy forces of the states in the region. Later on, the development of Vietnam and China in building new tourism resorts in the Spratlys and Paracels features, the further clashes among the fishing vessels of China, the Philippines, Vietnam and Taiwan showed the ineffectiveness of the non-binding effect of the DOC in maintaining stability for the region. In addition, one of the key issues for cooperation that of conflicting sovereignty claims was still left aside from the discussion.

3.2. Diplomatic measures in the future: Towards a joint development regime

3.2.1. Why diplomatic measure should focus on joint development

The failure of the diplomatic measures in the 1990s shows that sticking to sovereignty claims, while lacking of a binding dispute settlement mechanism, cannot settle the dispute. Conflicts still occur among the parties and put the security of the region at a great danger due to the mounting need for natural resources in the South China Sea, especially the fisheries and hydrocarbon resources.[604] During the last decades, the countries in the South China Sea region have formed the most dynamic economic development region of the world. As the country with the highest economic growth for the last two decades and accounting for one fourth of the world population, China needs oil to produce fertilizer to guarantee sufficient agricultural production to feed its enormous population and to fuel the many industries of the country like textile, transportation, metallurgy, etc.[605] ASEAN countries also have a great demand for the hydrocarbon, fishery and other resources of the South China Sea in order to develop their economies.[606]

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[604] See *supra,* Chapter 1, Section 2. An author even suggested that if a third world war would happen, it would originate from the South China Sea, see Ian Slater, *WWIII: South China Sea,* (New York: Ballantine Books, 1996).

[605] It was estimated that by 2010, China will need to import 100 million tonnes of crude oil annually if no large oil fields are found. The oil demand of China has been increasing between 5-5.5 percent annually since the 1990s. Source: Valencia *et al., op.cit.,* note 16, p.83.

[606] For further discussion, see *supra,* Chapter 1, Section 2.

Besides economic reason, it is also noteworthy that the South China Sea is a semi-enclosed sea in which the marine system is naturally unified. Littoral states are parties to the 1982 LOSC, and thus they abide by the cooperation obligation under Article 123 of the 1982 LOSC. Accordingly, they have an obligation to cooperate in exploration and exploitation of living resources, protection of the marine environment and scientific research to which, primarily, is the need for building a fishery management regime to protect the resources and maintain the security in the region. [607]

All the above mentioned reasons suggest that diplomatic measures will only be effective if they take into account the quest for an interim measure to meet the economic demand of the parties as well as to maintain security and peace in the region. Among many interim measures, joint development is proving its success in state practice.

So far, joint development as cooperative state practice in the exploitation of resources that straddle maritime boundaries has grown significantly. In 1989, the British Institute of International and Comparative Law found 12 bilateral treaties providing for joint development of resources of the continental shelf,[608] and today, about 30 such agreements have been concluded.[609] Several new joint areas have been negotiated, involving states in many different parts of the world.[610] Many of them are very successful in implementing and providing a mechanism for cooperation among states in cases of overlapping maritime areas. For example, the Timor Gap Treaty which was concluded by Indonesia and Australia in 1989 was renewed under the name of the Timor Sea Treaty after the independence of East Timor in 2002. This model was considered the most well structured mechanism for joint development.[611] The 1959 Antarctica Treaty also has been successful in harmonising the interests and claims of multiple parties and preserved

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[607] So far, fishing activities in the South China Sea were out of control and led to the fish stock shortage and clashes among fishermen and soldiers among the littoral states. See details, *supra,* Chapter 1, Section 2.1.

[608] Hazel Fox, Paul Mcdade, Derek Rankin Reid, Anastasia Strati and Peter Huey, *Joint Development of Offshore Oil and Gas,* (British Institute of International and Comparative Law, Vol.1, 1989), p.33.

[609] David Ong, "Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?" (1999) 93(4) *AJIL* 771, at 787-795, particularly footnote 139, p.787-8.

[610] The new joint areas under negotiation are between Colombia and Jamaica, Guinea-Bissau and Senegal, Nigeria-Sao Tome and Principe, Cambodia and Vietnam, etc. For discussion see, David Anderson, "Developments in Maritime Boundary Law and Practice" in David A. Colson and Robert W. Smith (ed.), *International Maritime Boundaries,* (Leiden, Boston: Martinus Nijhoff Publisher, Vol.5, 2005), p.3199 at 3216.

[611] For discussion of the joint development under Timor Gap and Timor Sea Treaties, see Stuart Kaye, "The Timor Gap Treaty: Creative Solutions and International Conflict" (1994) 16 *Sydney L. Rev.,* p.72 and Gillian Triggs and Dean Bialek, "The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap" (2002) 3 *Melb J. Int'l L.,* p. 322.

Antarctica for peaceful cooperation in scientific research and environmental protection.[612] In east and south-east Asian regions, state practice in joint development has also proved its success through the implementation of some bilateral treaties between Thailand and Malaysia, Vietnam and Malaysia and South Korea and Japan.[613]

From its success in state practice, joint development is also suggested as a feasible solution for the South China Sea.[614] Building a joint development regime may also be the wishes of the parties as China proposed joint development in the statement of Chinese Premier Li Peng in 1990 and Foreign Minister Qian Qichen in 1995. Most recently, a positive signal was the reaching of an agreement, for conducting research on hydrocarbon potential in the north-eastern of the South China Sea between China, Vietnam and the Philippines.[615]

3.2.2. Requirements for a possible joint development model in the South China Sea

A joint development as an agreement between two states to develop so as to share jointly in an agreed proportion by interstate cooperation and national measure the offshore oil and gas in a designated zone of seabed or subsoil of the continental shelf to which both or either of the participated states are entitled in international law.[616]

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[612] For discussion, see Christopher C. Joyner, *Antarctica and the Law of the Sea,* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992).

[613] These treaties were concluded in 1979, 1992 and 1974 respectively and still enforce. For details, see Jonathan I. Charney and Lewis M. Alexander, *op.cit.*, note 98, Report 5-13(2), p.1099, Report Number 5-19, p.2341 and Report 5-12, p.1057 respectively.

[614] The suggestion was initially introduced by the Jose de Venecia, Chairman of the House Foreign Affairs Committee of the Philippines in the meeting of 26 September 1988. Then, this was discussed by a number of scholars, namely Mark Valencia, Prescott, Monique, etc. For further discussion of the origin of the idea for joint cooperation, see Hurng-yu Chen, "The Prospects for Joint Development in the South China Sea", December 1991 *Issues and Studies,* 112 at 114-6.

[615] China and the Philippines reached an agreement to joint scientific research between the Philippines National Oil Company and the China National Offshore Oil Company in the South China Sea in September 2004. Vietnam also joined in this agreement in March 2005. This movement was hailed as a diplomatic breakthrough for peace and security in the region. For details of the agreement, see Press Release of The Department of Foreign Affairs of the Philippines, online at
http://www.dfa.gov.ph/news/pr/pr2004/sep/pr524.htm (accessed on 19 October 2004).
Under this joint exploration agreement in the Eastern area of the Spratlys among China, the Philippines and Vietnam, the survey vessel of China collected seismal data from the seabed on 16 November 2005 and the statistics of hydrocarbon resources for the region is expected to be available in the coming years. (China, Vietnam and the Philippines end seismal survey in the South China Sea, for detail see: http://tuoitre.com.vn (accessed on 20 November 2005)).

[616] Definition of a group of researchers of the British Institute of International and Comparative Law published in Hazel Fox *et al.*, *op.cit.*, note 608, p.45. The concept of international joint development is not understood in a uniform way. For example, a group of lawyers at the East-West Centre Workshop in 1980 agreed that "used as a generic term, joint development extends from unitization of shared resources to unilateral development of a shared resource beyond a stipulated boundary, and various gradations in between". (Quoted in Masahiro Miyoshi, "The Basis Concept of Joint Development of Hydrocarbon Resources on the Continental Shelf: With Special Reference to the Discussions at the East-West Centre

This definition provides that joint development is the product of the cooperation among state concerned which results in an agreement. From the point of view of international law, it would be advisable to restrict this to an inter-governmental agreement and exclude joint venture between a government and a company.[617] The content of the agreement for joint development must design a specific zone for joint development, method of appointment, choice of operator, financial provisions, the regulatory authority and the identification of the laws to be applied. Other points that may also be included are provisions on safety, health, requirements prohibiting pollution and for the protection of the marine environment, and a procedure for dispute settlement.[618] These legal features of joint development were reflected with flexible application in state practice depending on the scope of the cooperation and the situation of each case.

The situation of the South China Sea dispute involving multiple claims in both sovereignty and maritime issues and a complicated dispute history with much tension and confidence deterioration by military clashes raises the need for a special regime of cooperation.

First, a possible joint development mechanism for the South China Sea should be able to harmonise the multiple sovereignty claims of the parties. Currently, there are 6

Workshops on the South-East Asian Seas" (1988) 3 *IJECL* 1 at 5). Lagoni, in a report on joint development at the 1988 Warsaw meeting of the International Law Association, defined that "joint cooperation is the cooperation between states with regard to the exploration for and exploitation of certain deposits, fields or accumulation of non-living resources which either extend across a boundary or lie in an area of overlapping claims". (Lagoni was a Rapporteur to the EEZ Committee of the International Law Association. For details, see R. Lagoni, *Report on Joint Development of Non-living Resources in the Exclusive Economic Zone,* (Warsaw: Warsaw Conference of the International Committee on the Exclusive Economic Zone, International Law Association, 1988), p.2 quoted in Hazel Fox *et al., op.cit.,* note 608, at p.44). Valencia also suggested that "international joint development is the common exercise of sovereignty rights by two or more states for the purpose of exploration and exploitation of the non-living resources of an area under national jurisdiction" (Mark Valencia, "Taming Troubled Waters: Joint Development of Oil and Mineral Resources in Overlapping Claim Areas" (1986) 23 *San Diego L. Rev.*, p.661 at 683). Townsend-Gault and W.G. Stormont recently also suggested "an offshore petroleum joint development arrangement as typically one where two or more countries enter into a formal agreement for cooperative development of and the sharing of revenues derived from oil and gas activities within a given offshore area by pooling their sovereign rights with respect to that area" (I. Townsend-Gault and W.G. Stormont, "Offshore Petroleum Joint Development Arrangement: Functional Instrument? Compromise? Obligation?" in G.H. Blake (ed.), *The Peaceful Management of transboundary resources,* (London: Graham Le Trotman, 1995), p.51).

[617] Masahiro Miyoshi, "The Basis Concept of Joint Development of Hydrocarbon Resources on the Continental Shelf: With Special Reference to the Discussions at the East-West Centre Workshops on the South-East Asian Seas" (1988) 3 *IJECL* 1 at 5. This is the correct approach as the nature of joint cooperation is the cooperation between states. The involvement of a private company, if any, will only under the authorisation of one of states concerned and by another agreement in the implementation phrase, i.e. a 'concession' agreement or an 'internationalised' contract.

[618] Hazel Fox *et al., op.cit.,* note 608, p.46.

claimants to the dispute in which four of them, namely Brunei, Malaysia, the Philippines and Vietnam, are in a close relationship within ASEAN framework. This association is heading forward to a common community by approving its charter by the end of this year.[619] The fifth party is China and in comparison with other parties, it is a large and rising power. Although China does not have the strongest legal position, it has the strongest influence based on its size and economic, military and political strengths which creates difficulties in balancing the rights and obligations of the parties in a joint development mechanism. Thus, any joint development arrangement must take into account China's interests. The position of China also creates difficulties, as it does not accept the recognition of Taiwan in any form, whereas Taiwan's role in some areas, e.g. fisheries, cannot be ignored. Although Taiwan has not been successful in establishing its statehood, it is recognised as a special entity with relative independent rights and obligations under international law. Taiwan is also a party with separate claims to the Spratlys in the South China Sea dispute. The fact that all of these parties differ not only in their interests, but also in their power may affect the cooperation of the joint development regime. Therefore, harmonising the diversified interests of these parties and taking into account the realpolitik in the region would be a crucial point for the success of the mechanism which differs from most of the other bilateral joint development agreements.

Second, with much confidence deterioration, such mechanisms must provide a tool for confidence building. The confidence among these parties was ruined by not only the direct military clashes in 1974, 1988 and 1995, but also the inconsistent policy of China relating to the South China Sea. Moreover, the confidence among ASEAN parties themselves was also at a low level due to the affect of the differences of their idealism during the Cold War. Therefore, a possible joint development mechanism for the South China Sea should primarily facilitate confidence building by providing forums for parties to exchange points of view, to highlight policy transparency, and to restrain from further use of force thus complicating the *status quo.* These are the preconditions for cooperation of a joint development mechanism.

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[619] This target was set out that the Joint Communique of the 40th ASEAN Ministerial Meeting held in Manila on 29-30 July 2007. For more information see: http://www.aseansec.org/20764.htm (accessed on 31 July 2007), particularly at points 20 and 21 of the Communique.

Finally, joint development is a model which generally applies to the exploitation of hydrocarbon resources. However, in a broader understanding, this model of cooperation can be extended to other resources such as living resources, environment, navigation, etc. Depending on the negotiation of the parties concerned, the cooperation models in these fields may have different names, but they share the same nature as a kind of cooperation activity among the parties to deal with the transboundary resources, e.g. the common name for cooperation in fishery is called joint fishery agreement, joint fishery zone, etc. In the situation of the dependent maritime environment of a semi-enclosed sea of the South China Sea, such a regime for cooperation should cover a wide range of issues. These issues varies including environment protection, marine scientific research, navigation safety and natural resources exploitation. This is also a requirement which makes the joint mechanism for the South China Sea differ from other bilateral joint development models which mainly cover joint exploration and exploitation in fishery or hydrocarbon resources.

Although the South China Sea dispute has some unique characteristics, there is no doubt that the examination of the main legal features of joint development in state practice will help to build up a suitable model for the South China Sea.

3.3. A closer look at the goal for diplomatic measure: A suitable regime for joint development in the South China Sea dispute

3.3.1. Area for cooperation

The purpose of joint development is to exploit the straddling seabed deposits lying across the boundary of the states or in a disputed area. Thus, joint development may be designed for either an area where the parties have already reached a boundary or in an overlapping area. In the former scenario, the parties may anticipate the issue of straddling resources by mineral deposit clauses. This is the practice of state in many maritime delimitation agreements, e.g. agreement between Great Britain and Norway in 1965,[620]

[620] Article 4 of the agreement between Great Britain and Norway stipulates that: "If any single geological petroleum structure or petroleum field, or any single geological structure or field of any other mineral deposit, including sand or gravel, extends across the dividing line and the part of such structure or field which is situated on one side of the dividing line is exploitable, wholly or in part, from the other side of the dividing line, the contracting parties shall, in consultation with the licensees, if any, seek to reach agreement as to the manner in which the structure or field shall be most effectively exploited and the manner in which the proceeds deriving there from shall be apportioned." For full text of the Agreement, see Jonathan I. Charney and Lewis M. Alexander, *op.cit.*, note 98, Vol.2, Report 9-15, p.1879. In line with this provision later on in 1976-1979, the two countries concluded some joint development agreements relating exploitation oil and gas

between Iran and Qatar in 1969,[621] or the more recent between China and Vietnam in 2000,[622] etc.[623] Also in this case, if the parties are aware of the presence of cross boundary resources, the parties may negotiate and conclude another agreement relating to joint development of these resources along with the boundary agreement. For example, South Korea and Japan, during the negotiation process for maritime delimitation also reached an agreement on joint development in 1974.[624] This possibility suggests that even if the South China Sea is settled by judicial method, joint development may still be used for exploiting the straddling natural resources (if they exist).

In the latter scenario, joint development is applied in an overlapping area allowing the parties joint control and exploitation of the resources for their economic interests while the boundary has not been reached. This application could be seen from some state practice such as the 1979 Thailand and Malaysia joint development agreement[625] and the 1989 Timor Gap Treaty.[626] These kinds of arrangement do not overcome the problem of delimitation directly as they do not address the problem. Thus, joint development in this case is also considered as one of the interim measures while the parties have not yet to reach the final solution. However, by enabling the development of the resource on a cooperative basis, it may help to remove an element of competition from the process of delimitation and thereby facilitate a resolution.[627] In addition, if the parties agree to shelve the maritime delimitation for an indefinite time, joint development in this situation will be still considered a final solution.

If no solution is reached on the sovereignty and maritime issues, the area for cooperation in the South China Sea should be the overlapping area. The problem in the

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reservoir in the boundary area. For discussion on these agreements, see Masahiro Miyoshi, *op.cit.*, note 617, p.7, David Ong, *op.cit.*, note 609, at 773 and Lagoni, "Oil and Gas Deposits Across National Frontiers" (1979) 73 *AJIL* 215 at 225-6.

[621] For full text of the Agreement, see Jonathan I. Charney and Lewis M. Alexander, *ibid*, Report 7-6, p.1511.

[622] Agreement between China and Vietnam on the Delimitation of Territorial Sea, the Exclusive Economic Zone and Continental Shelf in Beibu Bay/ Bacbo Gulf. For full text of the Agreement, see David A. Colson and Robert W.Smith (eds.), *op.cit.*, note 513, Report 5-25, p.3745.

[623] For analysis on mineral deposit clauses, see Lagoni, *op.cit.*, note 620, at 229-233.

[624] For details of the negotiation and full text of the agreements, see Jonathan I. Charney and Lewis M. Alexander, *op.cit.*, note 98, Vol.1, Report 5-12, p.1057.

[625] Jonathan I. Charney and Lewis M. Alexander, *International Maritime Boundaries, ibid*, Report 5-13, p.1099.

[626] Jonathan I. Charney and Lewis M. Alexander, *op.cit.*, note 620, Vol.2, Report 6-2(5), p.1245.

[627] Charles Robson, "Transboundary Petroleum Reservoirs: Legal Issues and Solutions" in G.H. Blake, *op.cit.*, note 616, p.3 at 12.

South China Sea case is that some of the maritime claims are not clarified.[628] Thus, several proposals were made for the cooperation area in the South China Sea. The most comprehensive is the proposal of Mark J. Valencia in which four options are listed as follows:

(A) The cooperative area will be the area enclosed by a line equidistant between undisputed baselines of the littoral countries and the Spratlys features. This proposal was also made by Professor Prescott which he suggested for both the Spratlys and the Paracels.[629] Valencia argues for the choice of this option that the use of equidistance lines is usually in accordance with international law. However, it should be noted that by application of equidistance lines, the Spratlys would be recognised as having equal effect in generating maritime zone with the mainland territory of the littoral states. This will cause distortion as all the Spratlys' feature are tiny. In addition, Valencia also justifies this option on the basis of the nine dotted lines in the maritime claims of China and Taiwan which are not well based on in international law.[630] Thus, it is submitted that this option is not suitable for the cooperative area in the South China Sea.

(B) The cooperative area will be the area beyond 200 nautical miles from legitimate coastal baselines, and beyond the legal limit of coastal continental shelves. This option seems to match with the shaded area achieved from a prospect maritime delimitation process after giving full effect to the mainland of the littoral states.[631] Thus, it is submitted that this area may be applicable for a cooperative zone in the South China Sea.

(C) The cooperative area will be the area claimed by three or more claimants. This option is an approach derived from the foundation ideas of the joint cooperation regime that joint cooperation is used to avoid the complexity of the maritime boundary where parties to the dispute pool their sovereignty for cooperation. Accordingly, the maritime claims of the parties would dictate the expansion of the area for joint cooperation. This might be the correct approach in order to identify the area for joint development. Applying this to the South China Sea dispute, on the one hand, this approach will simplify the identification of the zone for joint development by just combining all the maritime claims. On the other hand, it encourages the parties to expand their claims in order to

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[628] See *supra,* Chapter 4, Section 3.
[629] Victor Prescott, *The South China Sea: Limits of National Claims,* (Maritime Institute of Malaysia, 1996).
[630] See *supra,* Chapter 4, Section 3.2.
[631] See *supra,* Chapter 4, Section 4.

increase their ability to participate in joint cooperation. Therefore, this approach must be based on legitimate maritime claims, [632] i.e. we can combine this option with option B to arrive at some smaller zones with different participants within the entire cooperative zone.

(D) The cooperative area will be the area enclosed by a line connecting the outermost Spratlys' islets (or all drying reefs).[633] This option can be justified on the basis of the analogy of archipelagic waters. In the case of archipelagic states, due to the dependence of the islands, the 1982 LOSC allows archipelagos to connect the outer points to form the archipelagic baseline. However, in this case, as the Spratlys does not qualify an archipelagic state, the legitimacy of the application of this line is controversial. Furthermore, it will result in a smaller area in comparison with option B. Therefore, this option is not likely to be accepted.

Given the above analysis, it is submitted that the area beyond 200 nautical miles from legitimate coastal baselines and beyond the legal limit of coastal continental shelves should be used as a cooperative zone for the South China Sea.[634] Depending on the recommendation of the Commission on the Limits of the Continental Shelf, this may result in two different areas: one beyond the EEZ of coastal states, the other beyond the continental shelf, if some littoral states delineate their continental shelf beyond 200 nautical miles in compliance with the recommendation of the Commission. Within this/these areas, the parties may decide to further divide into smaller areas according to parties' claims according to option C, in order to facilitate the cooperative activities. The zones for cooperation can be illustrated in the following figures.

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[632] The nine dotted lines in maritime claims of China and Taiwan would not be taken into account as they violate international law and the weaker effect of the Spratlys' features will be counted as analysed in Chapter 4, Sections 3.2 and 4.2.1, *supra*.

[633] Mark J. Valencia *et al.*, *op.cit.*, note 16, p.205.

[634] Wei Cui argued that the area enclosed by a line equidistant between undisputed baselines of the littoral countries and the Spratlys' features under option A was the fair solution to the dispute. However, his argument is based only on the purpose of harmonising the maritime claim of all parties without considering the legitimacy of the maritime claims of each party and the status of the Spratlys under international law. For details, see Wei Cui, "Multilateral Management as a Fair Solution to the Spratlys Dispute" (2003) 36 *Vand. J. Transnat'l L.*, 799 at 833-7.

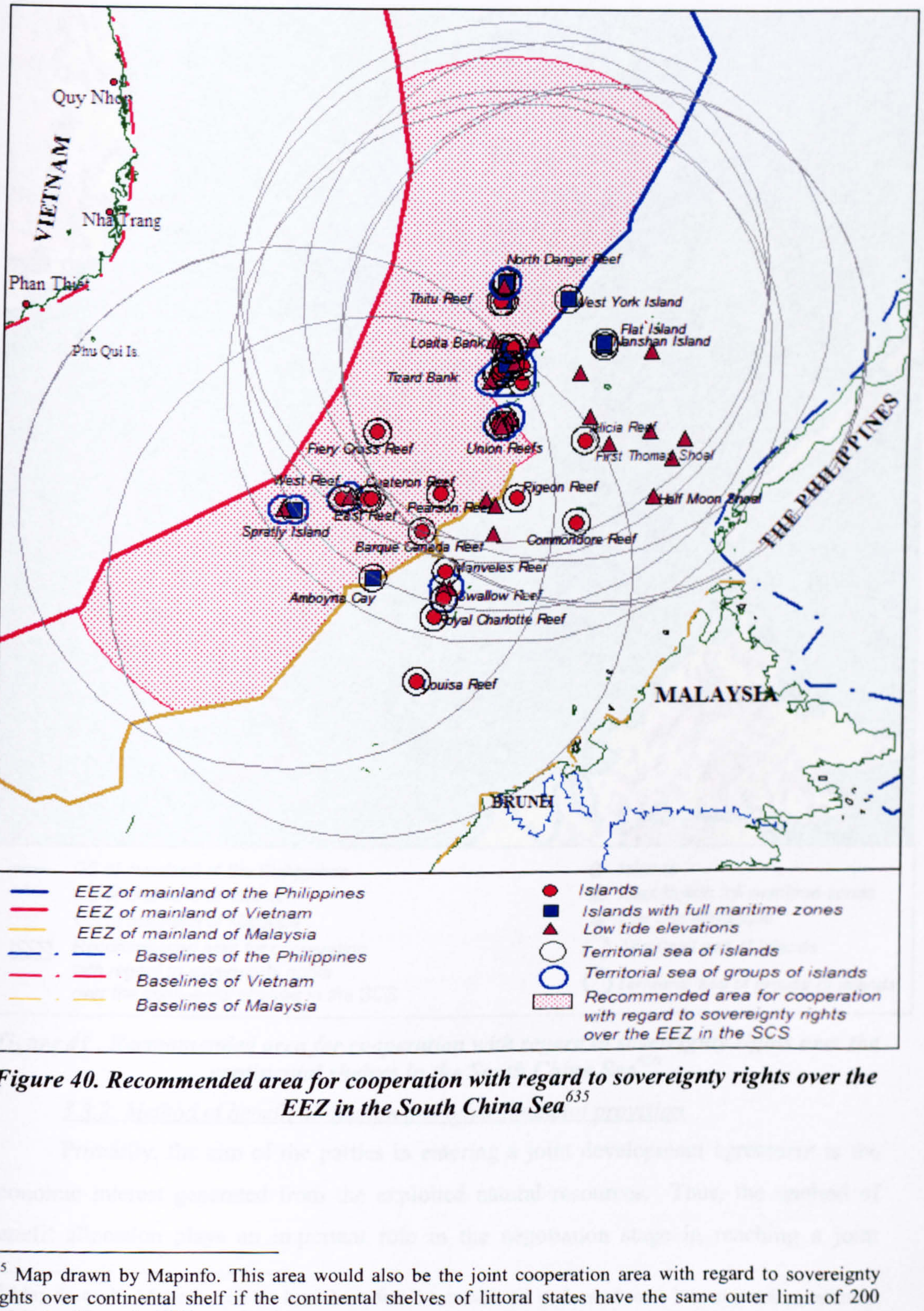

Figure 40. Recommended area for cooperation with regard to sovereignty rights over the EEZ in the South China Sea[635]

[635] Map drawn by Mapinfo. This area would also be the joint cooperation area with regard to sovereignty rights over continental shelf if the continental shelves of littoral states have the same outer limit of 200 nautical miles as the EEZs.

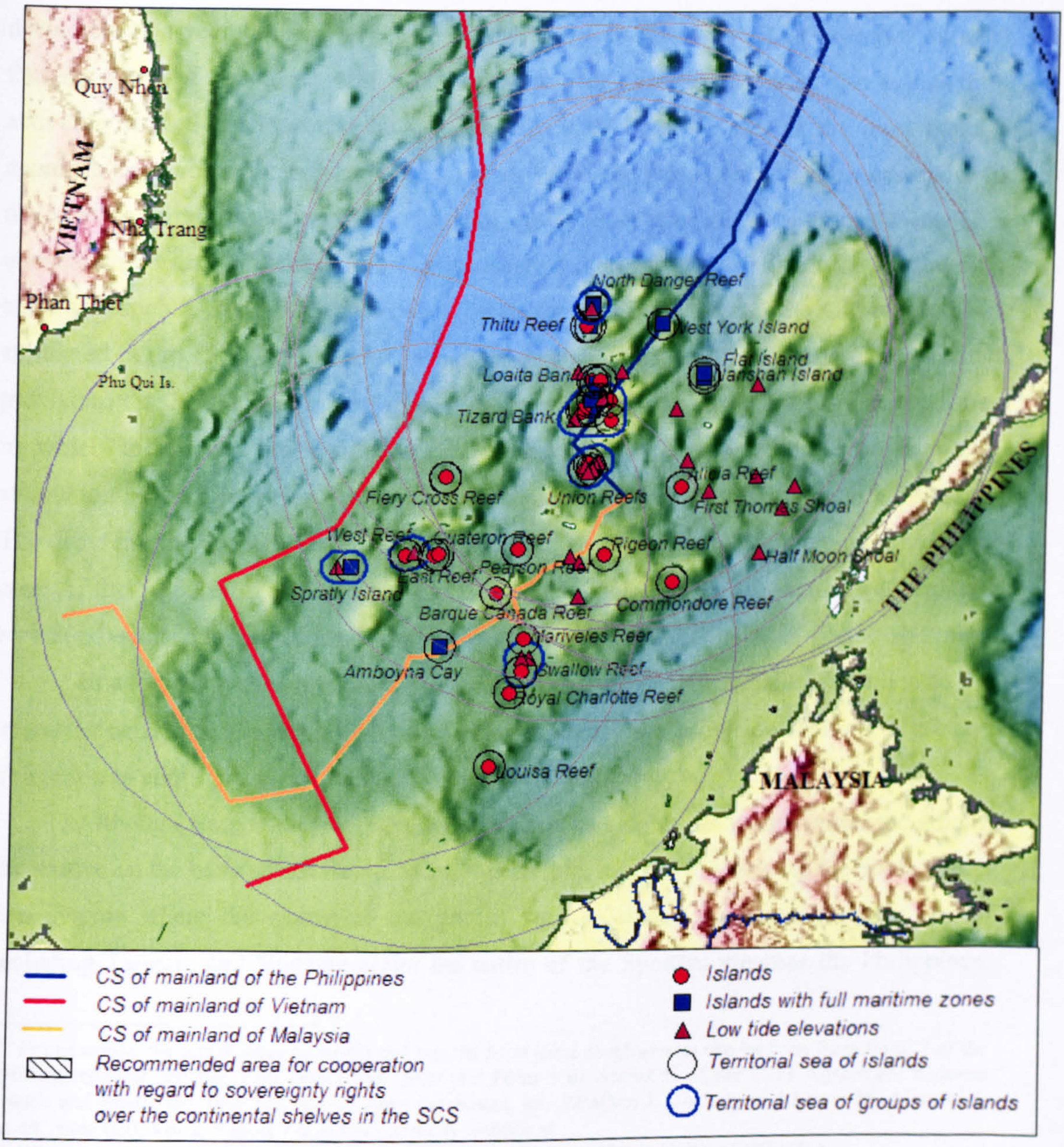

Figure 41 . Recommended area for cooperation with regard to sovereignty rights over the continental shelves in the South China Sea[636]

3.3.2. Method of benefit allocation and other financial provision

Primarily, the aim of the parties in entering a joint development agreement is the economic interest generated from the exploited natural resources. Thus, the method of benefit allocation plays an important role in the negotiation stage in reaching a joint

[636] Map drawn by Mapinfo with the hypothesis that the continental shelves of some littoral states are allowed to delineate beyond 200 nautical miles.

development agreement and later on in the implementation phase. State practice showed that for most of the cases, states choose to allocate the benefit from the exploitation activities as well as financing the operation in equal basis.[637] This is the most popular approach as it brings a fair share for the parties. However, particularly in some cases, due to the location of the resources, the parties may agree on an unequal share among them. This unequal share may be reflected by an unbalanced ratio for benefits from the exploitation activities, such as the 60:40 percentage production for Norway and the UK respectively stipulated in the 1976 Agreement between the UK and Norway.[638] In a more complicated provision, the unequal share may also be reflected by the establishment of different zones in which the parties are entitled to different benefits. This could be seen from the stipulation of the Timor Gap Treaty in which three zones (A, B and C) were established.[639] The different size of each zone alone reflected the unequal benefit for the parties. Also, in zone A, the 50:50 ratio of benefit in the 1989 Treaty between the two states was replaced by a 90:10 split in favour of East Timor by the revision in 2002.[640]

In addition to the stipulation on benefit allocation and financial contribution to the operation activities, the parties may also need to clarify the provision relating to tax and obligation to contribute to the Seabed Authority (if applicable).

Although from state practice the obligations and rights are mainly allocated among the parties on the basis of sovereign equality principle, it is not the case for the South China Sea dispute where the claims of the parties vary in scope and legal strength. China, including Taiwan, and Vietnam claim the entire of the Spratlys whereas the Philippines,

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[637] For example, the equal share on profit and benefit from joint development can be seen from Point 7 of the 1969 Agreement between Abu Dhabi and Qatar and Point 1 of Annex II of the 1974 Agreement between France and Spain, etc. (For full text of these agreement, see Jonathan I. Charney and Lewis M. Alexander, *op.cit.*, note 620, Vol.2, Report 7-9, p.1541 and UN website at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/FRA-ESP1974CS.PDF (accessed on 24 July 2006)).

[638] Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway relating to the exploitation of the Frigg Field Reservoir and the transmission of gas from there to the United Kingdom, London 10 May 1976. For full text, see Churchill *et al.* (eds.), *New Directions in the Law of the Sea* (London and Oceana: British Institute of International and Comparative Law, 1977, Vol.5) at p.398.

[639] For details, see Article 4 of the 1989 Treaty. Zone B lies at the southern end of the Zone covering 5,178 square nautical miles and is administered by Australia. Zone C is of 1,576 square nautical miles and lies at the northern end of the Zone under the jurisdiction of Indonesia, now replaced by East Timor. Zone A is the largest and central area with 9,375 square nautical miles and is under joint development.

[640] Article 4 of the Timor Sea Treaty, full text available at http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/PDFFILES/TREATIES/AUS-TLS2002TST.PDF (accessed 21 October 2005).

Malaysia and Brunei only claim part of it. The legal strength of the claims of Vietnam is also considered stronger than that of the other claimants.[641] Thus, it is submitted that the equal principle should not be applied to allocate the benefit in any joint development of the South China Sea.

In order to achieve a fair solution for benefit allocation, one of the options is that the parties should recognise each other's claims. Then, the benefit allocation will be based on the area where they claimed. That means the entire cooperative zone would be further divided into smaller zones according to the number of claimants. In each small zone the equal principle may be applicable. This way, each claimant would have a compatible share with their claims.

Another option is that the parties should recognise the current occupation as the basis for benefit allocation. If this recognition is reached, the maritime delimitation will be feasible, so that granting a relative ratio of the maritime zone to the parties. This ratio might be used for benefit allocation for the prospect joint development of the South China Sea. This allocation is based on the *status quo* of the dispute.

The two above mentioned benefit allocations only serve as suggestions to the parties. Which option will be agreed will totally depend on the wills of the parties in the negotiation process and also the contribution of the parties to facilitate exploration and exploitation.

3.3.3. Choice of operator and regulatory authority

When questions over the identification of the cooperation zone and financial provisions are reached, the next issues, which also play an important role for the success of the joint development activities, are the choice of operator and regulatory authority. State practice shows great flexibility in stipulating these issues. Overall, state practice can be formulated into three types, namely operating and regulating through one of the parties, through a system of joint ventures between states or their nationals, and through an international joint authority.

Operating and regulating through one of the parties is the simplest manner of cooperation among states as it allows one state to manage the development of the deposits located in the joint development zone on behalf of both states and there is no institution

[641] See discussion *supra*, Chapter 3.

needed to be established. It offers the advantage of reducing the administrative cost and processing of the exploitation activities without the delays involved in setting up a new system. This way of operating and regulating may particularly be suitable for bilateral joint development. However, it requires the reduction or even loss of autonomy by the state whose sovereignty rights are administered by the other state. Thus, many states are reluctant to put themselves in this position, especially when the joint development is designed for the disputed areas.[642] Therefore, it was only applied in some early joint development agreements, e.g. the 1958 Saudi Arabia-Bahrain[643] and the 1969 Abu Dhabi-Qatar Agreements.[644]

The second option from state practice is that of establishing a system of joint ventures. This system requires the participation of all parties in the development process on its own or through authorised nationals. It may lead to the establishment of an administrative body where all parties have a representative. Following this way, all parties have equal rights not only to the benefit but also to the regulating of the development. Thus, it is the most popular model in state practice. This can be seen from a number of joint development agreements, e.g. the agreements between Kuwait and Saudi Arabia,[645] Japan

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[642] The states fear appearing to accept, however, implicitly, a status quo that confers *de facto* jurisdiction on the other state, even if the *de jur*e position is explicitly reserved. Such apparent acceptance may cast doubt on the strength of these states' claims to the area. For more discussion, see Hazel Fox *et al.*, *op.cit.* note 608, p.149 and 152 and David Ong, *op.cit.*, note 609, p.788.

[643] Jonathan I. Charney and Lewis M. Alexander, *op.cit.*, note 620, Report 7-3, p.1489. The Agreement divided a disputed area of continental shelf in the Persian Gulf between the two parties. It simultaneously provided for the equal sharing of the net income derived from the exploitation of the Fashtu bu Saafa Hexagon, an area lying on the Saudi side of the delimited continental shelf boundary. Saudi had the sovereignty rights and administrated the designed area, meanwhile, Bahrain only entitled to half of the net revenues from the designed area.

[644] Jonathan I. Charney and Lewis M. Alexander, *op.cit.*, note 620, Report 7-9, p.1541. The Agreement provided that both states had equal rights of ownership over a single oil field, the Hagl El Bundug, even though the delimitation placed most of the field within the maritime jurisdiction of Qatar. The development of the field was solely conducted by Abu Dhabi and its company, the Abu Dhabi Marine Areas Co..

[645] The 1965 Agreement between Kuwait and Saudi Arabia divided the zone into the neutral and annexed zones in which Article III stipulated that each state exercised the "rights of administration, legislation and defence over the part annexed to its territory". However, the natural resources are shared. In the neutral zone, each state entered into a separate concession agreement with one company in respect of its undivided 50% interest. Each state had equal representatives on the board of directors of the company. The terms of each concession agreement differ. The onshore zone was treated somewhat differently. Each state entered into a concession agreement with two separate (and) unrelated companies which differed in its terms from that of the other. For full text of the agreement, see Sayed M. Hosni, "Partition of the Neutral Zone" (1966) 60 *AJIL* 735 at 744-49.

and Korea,[646] Malaysia and Vietnam,[647] Colombia and Jamaica,[648] and Argentina and the Untied Kingdom.[649]

The final choice in state practice to operate and regulate the joint development activities is to establish a supra-national authority. This is the most complicated option which requires a much higher level of cooperation than the two previous options and which reduces national autonomy. The agreement among states under this option leads to the establishment of an international joint authority with legal personality, licensing and regulatory powers and a comprehensive mandate to manage the development of the designed zone on the parties' behalf. Such joint authorities are strong institutions with extensive supervisory and decision-making powers and wide ranging functions, as opposed to the weak liaison or consultative type of bodies under the direction of the parties

[646] The 1974 Agreement between Japan and South Korea stipulated that the exploration and exploitation in a defined joint development zone would be carried out in further divided subzones by entities nominated by both states under a joint operating agreement (Articles III(1), IV(1) and V(1)). Each entity had exclusive operational control over the relevant subzone (Articles V(1) (b) and VI). Strategic control of hydrocarbon development in the joint zone is retained by the two states by requiring that both of them approve the joint operating agreements (Article V(2)). A joint Committee was established from equal representative of both states, however, it had only a limited role for liaison purposes only (Article XXV). For full text of the Agreement, see Jonathan I. Charney and Lewis M. Alexander, *op.cit.*, note 98, Report 5-12, p.1057.

[647] The 1992 Memorandum of Understanding between Malaysia and Vietnam nominated the respective national oil companies, Petronas of Malaysia and Petrovietnam of Vietnam to undertake the exploration and exploitation of petroleum within the defined area of overlapping continental shelf claims (Article 3(a)). Both parties agreed to urge their national companies to conclude a commercial agreement on the exploration and exploitation of petroleum in the defined area (Article 3(b)). The commercial agreement was subject to the approval of the two governments (Article 3(b)). For full text of the Memorandum, see Jonathan I. Charney and Lewis M. Alexander, *op.cit.*, note 98 ,Vol.3, Report Number 5-19, p.2341.

[648] The 1993 Treaty between Colombia and Jamaica stipulated the joint management and control of the parties over the exploration and exploitation of the living and non-living resources in the defined zone (Article 3(1)). The Agreement particularly required agreement of both states on activities related to the development of non-living resources, marine scientific research and marine environmental protection (Article 3(2) and (3)). A Joint Commission was set up to facilitate these joint actions and to perform any other functions assigned to it by the parties within the ambit of the agreement (Article 4(1)). The conclusions of the Joint Commission were to be reached by consensus and were recommendatory only, unless they were adopted to be binding by the parties (Article 4(3)). For full text of the Treaty, see Jonathan I. Charney and Lewis M. Alexander, *op.cit.*, note 98, Vol.3, Report Number 2-18, p.2179.

[649] The 1995 Joint Declaration by Argentina and the United Kingdom also established a facilitative Joint Commission which was in charge with submitting recommendations to the two governments on marine environmental protection, as well as the promotion, development and coordination of the hydrocarbon regime, both within the designed special area of cooperation and beyond (Paras.2-4). The coordination of the exploration and exploitation activities was assigned to a subcommittee of the commission (Para.4(b) (i-v)). Under the Declaration, the parties agreed to cooperate not only in encouraging offshore activities in the Southwest Atlantic but also in regulating the different stages of offshore activities undertaken by commercial operators, including the eventual abandonment of installations (Paras.2 and 7). Petroleum exploration and exploitation in the special area of cooperation was expected to proceed on a joint venture basis, with 50% licensed by the Falkland Islands government and 50% by Argentina. For full text of the Declaration, see UK-Argentina: Joint Declaration cooperation over the offshore activities in the South West Atlantic, (1996) 11 *IJMCL* 113. For discussion, see Churchill, "Falkland Islands - Maritime Jurisdiction and Co-operative Arrangements with Argentina" (1997) 46 *ICQL* 463.

established under the second option, described above.[650] Examples of this structural option can be seen from the agreements between Sudan and Saudi Arabia,[651] Malaysia and Thailand,[652] Timor Gap,[653] and Guinea-Bissau and Senegal.[654]

The Antarctica model, in particular, does not follow any of the three common options. Under the 1959 Antarctica Treaty, the basis document for the cooperation of parties concerned, a permanent Antarctic Treaty Secretariat was established in 2004 in Buenos Aires, Argentina to regulate the cooperative activities in this region. However, the actual administration is placed under a special intergovernmental regime operating through biennial (annual with effect from 1992) Consultative Meetings held in rotation in member states and adopting recommendations by consensus. This is a flexible regime that can be

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[650] Miyoshi, "The Joint Development of Offshore Oil and Gas in Relation to maritime boundary delimitation" (1999) 5 *Maritime Briefing* 3 at 43-44.

[651] The Joint Commission established in the 1974 Agreement between Sudan and Saudi Arabia had legal personality as a body cooperative in both Saudi Arabia and Sudan. The Commission was empowered to consider and decide in accordance with the conditions it prescribes the applications for licenses and concessions concerning exploration and exploitation of the natural resources of the seabed in the common zones. For full text of the Agreement, see Churchill *et al.* (eds.), *New Directions in the Law of the Sea* (London: Oceana : British Institute of International and Comparative Law, 1977, Vol.5) at p.393.

[652] Malaysia and Thailand initially committed in Article 3(2) of the 1979 Memorandum that all their rights and responsibilities over all the non-living natural resources of the seabed and subsoil were designed for joint development. All the cooperation activities are designed to be managed by a Malaysia-Thailand Joint Authority which is in charge of controlling all aspects of policy and decision-making for the exploration and exploitation of the non-living natural resources in the joint development area. The Joint Authority will not be able to proceed in either the domestic or international arena, and especially not the international arena, without prior approval from both government. Thus, the Joint Authority does not have independent legal competence in relations with other outside entities, except strictly in commercial matters (Article 7(2)(e)). For full text of the Agreement, Jonathan I. Charney and Lewis M. Alexander, *op.cit.*, note 98, Report 5-13(2), p.1099.

[653] The Timor Gap Treaty established one of the most complex and comprehensive management mechanisms which consisted of two levels, the Ministerial Council and the Joint Authority. The Ministerial Council is made up of ministers designed in equal number from time to time by the two states. It is a principal decision making body which is in charge with all matters relating to the exploitation for and the exploitation of petroleum in Zone A (Article 6). The responsibility of the Ministerial Council varies from giving direction to the Joint Authority, amending the petroleum mining code, approving production sharing contract proposed by the Joint Authority, etc. The Joint Authority is a subordinate body for the Ministerial Council, having responsibility for day to day management of activities relating to the exploration for and the exploitation of petroleum resources in zone A (Article 7 and 8). In order to fulfil this duty, the Joint Authority is entrusted to have juridical personality and legal capacity under the laws of both states. The Joint Authority is consisted of equal executive directors of each country which are appointed by the Ministerial Council. For full text of the Agreement, Jonathan I. Charney and Lewis M. Alexander, *op.cit.*, note 98, Report 6-2(5), p. 1245; also, see *infra*, Section 3.2.1.

[654] Under the 1993 Agreement and 1995 Protocol between the two states, an international (joint) Management and Cooperation Agency for Maritime Spaces was established to supervise joint exploration and exploitation activities within the designed Joint Exploitation Zone in accordance with proportions agreed upon in relation to the living (50:50) and non-living (85:15 in favour of Senegal) continental shelf resources (Article 2). The agency is also responsible for environmental protection in the designed joint exploitation zone (Article 23 of the Protocol). For full text of the Agreement and Protocol, see Jonathan I. Charney and Lewis M. Alexander, *op.cit.*, note 98, Vol.3, Report Number 4-4(4) and 5, p.2251 and 2257.

evolved to accommodate new circumstances and demands by the adoptions of recommendations and the conclusion of additional conventions and protocols on specific issues in the annual consultative meetings. Thus, after the Antarctic Treaty, the parties extended their cooperation by concluding some other treaties such as the 1964 Agreement Measures for the Conservation of Antarctica Fauna and Flora, 1972 Convention on the Conservation of Antarctic Seals, the 1980 Convention on the Conservation of Antarctic Marine Living Resources and the 1991 Protocol on Environmental Protection to the Antarctic Treaty.[655] Furthermore, the number of parties participating in the regime was also increased from 12 original consultative parties to 45 with an additional 16 consultative and 17 non-consultative. They include the seven nations that claim portions of Antarctica as national territory (some claims overlap) and 21 non-claimant nations.[656] All of the treaties constituted by the Antarctica Treaty System have allowed the claimants and non-claimants to co-exist and develop Antarctica in a flexible and pragmatic cooperative manner.

The choice of regulatory model and operator will depend on the position of parties concerned in the dispute, namely their political and economic consideration, the nature of the dispute and the degrees of national sensitivity.[657]

In the South China Sea dispute, the fields available for cooperation vary from those related to non-economic interests such as marine scientific research, marine environmental protection, safety of navigation and communication at sea, search and rescue operation and combat of transnational crime to those related to economic interests, namely joint exploitation in fishery and hydrocarbon resources. To gradually develop a mechanism for cooperation for such a wide range of activities, a well structured mechanism is ideal but not

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[655] For full text of these documents, see http://www.antarctica.ac.uk/About_Antarctica/Treaty/ (accessed on 27th January 2006).

[656] Claimant nations are Argentina, Australia, Chile, France, NZ, Norway, and the UK. Non-claimant consultative nations are Belgium, Brazil (1975/1983), Bulgaria (1978/1998) China (1983/1985), Ecuador (1987/1990), Finland (1984/1989), Germany (1979/1981), India (1983/1983), Italy (1981/1987), Japan, South Korea (1986/1989), Netherlands (1967/1990), Peru (1981/1989), Poland (1961/1977), Russia, South Africa, Spain (1982/1988), Sweden (1984/1988), Ukraine (1992/2004), Uruguay (1980/1985), and the US (the years in parentheses indicate when a consultative member-nation acceded to the Treaty and when it was accepted as a consultative member). Non-consultative members, with year of accession in parentheses, are Austria (1987), Canada (1988), Colombia (1989), Cuba (1984), Czech Republic (1962/1993), Denmark (1965), Estonia (2001), Greece (1987), Guatemala (1991), Hungary (1984), North Korea (1987), Papua New Guinea (1981), Romania (1971), Slovakia (1962/1993), Switzerland (1990), Turkey (1996), and Venezuela (1999) (Czechoslovakia acceded to the Treaty in 1962 and separated into the Czech Republic and Slovakia in 1993). Source: Scientific Committee on Antarctic Research, available online at http://www.scar.org/treaty/signatories.html (accessed on 3 June 2006).

[657] Hazel Fox *et al.*, *op.cit.* note 608, at p.115.

feasible at the moment when the political situation in the South China Sea region is still complicated and sensitive. The best option for a regulatory body at the early stage may be the bureaucratic networking mechanism, to some extent similar to the Antarctica model. In such a bureaucratic networking mechanism, only a Secretariat which is in charge of administrative duty needs to be established. The main regulatory duty could be placed under a special intergovernmental regime operating through annual meetings of all participants. All decisions, recommendations and treaties will be approved by consensus. Besides all parties to the dispute, other states which have related interest in the South China Sea like the rest of the ASEAN members, Japan, Russia and the United States may be invited to participate with observer status. The annual meetings may start with cooperation in non-economic interested fields in order to easily reach consensus among the parties, thus boost confidence building before further discussion on more complicated issues relating to economic interested fields. Furthermore, the parties may also agree to establish a cooperative mechanism with other organisations such as the IMO and UNEP to increase the effectiveness of the cooperation activities in the fields of marine environmental protection and safety of navigation and communication at sea.

However, so far the Antarctica model only shows its success in non-economic beneficial fields like scientific research and environmental protection, much still have to be done if the parties would like to cooperate in economic fields like exploitation of living and non-living resources. Meanwhile, in the South China Sea, the economic interests of the parties concerning fishery and hydrocarbon resources are a key point lying behind the parties' claims and are unavoidably to be dealt with. Therefore, the thesis will not suggest the copy of the Antarctica model to the South China Sea dispute. The way of dealing with sovereignty issue of the Antarctica model by shelving was actually the common way of other joint development models. The merits of the Antarctica model, which the South China Sea could learn from, lie at the way to gradually develop the cooperation field through negotiations. The thesis suggests the parties of the South China Sea dispute to follow this way in building up a bureaucratic networking for cooperation at the early stage of the cooperation. In the later stage when the parties agree to cooperate in economic field, well-structured model may be established. Particularly, stipulations related to the allocation of contractors in the exploitation of fishery and hydrocarbon resources may need to be further discussed once the parties agree to cooperate in these fields.

3.3.4. Applicable law

With the nature of the cooperation activities among states, joint development is primarily regulated by the joint development treaty. However, such treaties only serve as guidelines and principles for the cooperation among the parties. In the implementation phase, the parties usually agree to apply national legislations to regulate the issues concerning concession, contract, tax, tort, etc. Depending on the agreement of the operator and regulatory authority, the parties may allow the application of the national legislation of one party to the entire development activities[658] or of all the parties in their respected operating subzones.[659] However, the application of more than one set of laws in joint development may sometimes create conflict among the choice for the applicable law in the joint area. Furthermore, the choice of any national legislation to be applied in the joint area also leads to the fear of the situation of an autonomous 'government within a government'. In this case, the parties may legislate a completely new set of laws for the joint area or harmonise the existing laws.[660]

In the South China Sea dispute, the application of any national legislation will unlikely be accepted by the parties concerned. Hence, the building of applicable law for a prospect joint development regime can be learnt from the Antarctica model. Accordingly, observers, scientific personnel, and members of staff accompanying any such persons, shall be subject only to the jurisdiction of the contracting parties of which they are nationals in respect of all acts or omissions occurring while they are in the cooperative zone for the purpose of exercising their functions.[661] The application law in fields of fishery and

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[658] For example, in the 1969 Agreement between Abu Dhabi and Qatar, the application law was that of Abu Dhabi as this country was the sole operator in the joint development zone (Article 7). For full text, see *op.cit.*, note 644.

[659] For example, the 1974 Agreement between Japan and South Korea designed subzones in which one party had exclusive operational control and applied its national legislation (Article V and VI). For full text, see *op.cit.*, note 646.

[660] For example, Article 4 of the 1974 Agreement between Japan and Korea provides an element of concurrent jurisdiction which, in itself, would require a degree of harmonisation. The rights of regulation and enforcement as regards fishing, navigation, surveys, prevention of pollution and other similar matters extend to the area and must be respected by the Joint Authority. If offences against both laws occurred, adjustments would be made by the customs officials to consider the judicial procedures and evidentiary requirements of both countries. The framework within which such procedures would be operated might be a new organisation set up on a functional basis specifically for this purpose. For more discussion, see Hazel Fox *et al.*, *op.cit.* note 608, p.143-145. .

[661] Article VIII of the Antarctic Treaty. For full text, see http://www.antarctica.ac.uk/About_Antarctica/Treaty/ (accessed on 27th January 2006).

hydrocarbon resources should be subjected to further detail in separate agreements among states.

3.3.5. Sovereignty issue

In the case where joint development is designed for an area in which the parties already reached a boundary, the sovereignty issue will not be a problem as it was decided by the boundary. However, if joint development is applied to a disputed area, sovereignty is another important issue that the parties need to clarify. State practice showed several ways to deal with this issue.

First, other parties to the dispute may pool their sovereignty rights giving such right solely to one of the parties. This option requires the concession of other states to the one holding sovereignty. This only occurs if one party has a stronger position over the others in the dispute.[662]

Second, the parties may decide to create a co-ownership or condominium over the disputed area. By this option, the sovereignty rights of each state are merged into a new legal structure in exchange for defined rights and obligations. There is no single well-established form of condominium or resource sharing with recognised legal attributes in international law. The parties may choose to base them on national legal systems which provide various forms of sharing. Some forms give rise to rights *in rem* and are governed by the law of property. Others are created by the institutional or corporate structure and may be governed by company or trust law. And others depending on contract or good faith are governed by the law of contract and equitable principles.[663] Example of establishment condominium over a disputed area may be seen from the Antarctica model. Article 4 of the Antarctica provides that all the sovereignty claims over Antarctica have been frozen in a

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[662] For example, in the Svalbard model, the joint development agreement recognises Norwegian sovereignty over Svalbard subject to the reservation of certain economic rights and duties to other treaty members in an equal manner with Norway. The sovereignty was granted for Norway because of Svalbard's geographical adjacency to the Norwegian mainland, Norwegian interests on Svalbard and the need to find a proper solution of the dispute. For discussion on the application of the Svalbard model, see Robin Churchill and Geir Ulfstein, *Marine Management in Disputed Areas: The Case of the Barents Sea,* (London and New York: Routledge, 1992), p.23. For full text of the Agreement, see League of Nations Treaties Series, Vol.2, p.8. Also in Annex II of Bo Johnson Theutenberg, *The Evolution of the Law of the Sea: A Study of Resources and Strategy with Special Regard to the Polar Regions,* (Dublin: Tycooly International, 1984).

[663] Hazel Fox *et al., op.cit.,* note 608, p.48. Example of this option can be seen from the 1922 Uqair Treaty between Saudi Arabia and Kuwait in which the two states agreed to share equal rights in the neutral zone. This arrangement was capable of being construed as giving each state one half undivided share in the oil underground and 50% of the oil actually produced in the neutral zone, consequently each state enjoyed a right to receive in kind and separately dispose of its proportionate share of oil and in the event of any under-lifting had an inherent right to make up in kind, out of future production, such imbalances.

condition that permits the parties to continue to disagree vehemently on where, when, how and whether sovereignty has been properly acquired by states on or offshore of the continent, without jeopardising the treaty's ability to function.[664] Furthermore, the Article requires that no new claim or enlargement of an existent claim can be asserted while the treaty remains in force and no acts or activities which occur while the Treaty is in force can constitute a basis for any state "asserting, supporting, or denying a claim to territorial sovereignty in Antarctica or create any rights of sovereignty in Antarctica".[665]

Third, states may agree to convey their sovereign rights to a supra-national authority created for the purpose of joint development. Under international law, the supra-national authority is the new holder of sovereign rights and is empowered to deal with all the activities concerning joint development without further consent from the parties. This option requires not only the pooling of sovereignty by the states concerned but also a complicated and high-level structure for the joint authority.[666] The options for the sovereignty issue reflect the positions of states in a joint development agreement and lead to choice of operator and regulatory authority which have been examined earlier in this section.

In the South China Sea dispute, while the sovereignty issue has yet to be resolved, similar to other joint development models, the cooperation should be built on the condominium of the parties concerned in which the parties agree shelving the sovereignty claim. The parties may agree to pool their sovereignty for a certain period, e.g. 25 years, 50 years or 100 years. This agreement shall not prejudice the final settlement at anytime in the future. That means, after this period, the parties may reach agreement to extend the effect of the treaty for cooperation or reach a definite and final solution. In another options, the parties may give joint cooperation permanent status, i.e. joint cooperation equal to a final

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[664] Paragraph 1 of the Article 4 of the Antarctic Treaty provide that
Nothing contained in the present Treaty shall be interpreted as:
(a) a renunciation by any Contracting Party of previously asserted rights of or claims to territorial sovereignty in Antarctica;
(b) a renunciation or diminution by any Contracting Party of any basis of claim to territorial sovereignty in Antarctica which it may have whether as a result of its activities or those of its nationals in Antarctica, or otherwise;
(c) prejudicing the position of any Contracting Party as regards its recognition or non-recognition of any other State's rights of or claim or basis of claim to territorial sovereignty in Antarctica.

[665] Paragraph 2 of Article IV of the Antarctic Treaty.

[666] This option can be seen from the 1979 Thailand/Malaysian Agreement, the Timor Gap, etc.

resolution for the dispute. However, this requires a high consensus and definite pooling of sovereignty of the parties concerned, thus it is unlikely to be achieved in the coming time.

3.3.6. Dispute settlement

Dispute settlement in a joint development arrangement can be understood in two ways. On the one hand it refers to the dispute settlement procedure for those disputes which arise from joint development activities by the parties. Dealing with this kind of dispute, the joint agreement needs to clarify the applicable law, the jurisdiction applicable for the disputes. Again, it may depend on the agreement of the parties concerning the choice of operator and regulatory authority. This leads to the jurisdiction of the court of one or all of the parties and application of their respective national legislations or agreed body of law.[667] Alternatively, the parties may also set up a mechanism of arbitration by an *ad hoc* tribunal to settle the dispute concerning joint development among them.[668] All the above mentioned options may be applied to the South China Sea dispute. Accordingly, with regard to disputes occurring during cooperation, the parties may make a general statement to refer to all peaceful settlement means under international law. However, in a more effective manner, the parties also may agree to set up an *ad hoc* arbitral tribunal to settle their dispute.

On the other hand, dispute settlement is also understood as the relationship between joint development and the final settlement of the whole area in the case that joint development is designed for an overlapping zone. In this case, states may make an observation that joint development will be without prejudice to the final solution to the dispute.[669] Parties to the South China Sea dispute should also follow this way, otherwise they agree to use joint development as a final solution for the South China Sea dispute. Regarding the relations between joint development and maritime delimitation, the former do not overcome the problem of the latter directly as it does not address the problem. However, by enabling the development of the resource on a cooperative basis, joint

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[667] The jurisdiction of the Court of one party can be seen in the case that a country has sole right to control the joint development. The jurisdiction of all parties can be seen in the case that the joint development designs subzones and allocates each subzone to one party.

[668] For example, that is the agreement of parties in the Japan-South Korea Joint Development Agreement (Article XXVI), *op.cit,* note 646.

[669] For example, Article XXVIII of the Japan-South Korea Joint Development Agreement stipulates that "[n]othing in this Agreement shall be regard as determining the question of sovereign rights over all or any portion of the Joint Development Zone or as prejudicing the positions of the respective parties with respect to the delimitation of the continental shelf", *op.cit.*, note 646, at p.1085.

development may remove an element of competition from the process of delimitation and thereby facilitate the final resolution.[670]

In addition to all the main issues discussed above, other provisions concerning health, safety and pollution may also be included to ensure the sustainable development and protection of the environment.

4. Conclusion

The landmark award of the *Barbados v. Trinidad and Tobago* case opened the possibility of settling the South China Sea dispute by unilateral submission to the dispute settlement mechanism of the 1982 LOSC. However, the recent reservation of China submitted in compliance with Articles 298 has made such unilateral submission impossible to be invoked. The dispute settlement of the 1982 will only be used to help facilitate the dispute settlement through interpreting some articles of the 1982 Convention whose application is vital to the dispute.

As no judicial method is likely to be used, diplomatic measure is the only way for the parties to settle the South China Sea dispute. With the lessons learned from the diplomatic measures of the 1990s and taking into account the current situation in the South China Sea dispute, diplomatic measures in the future aiming at a joint development regime are likely to be an effective and feasible solution. The availability of an united and rich living and non-living resource of a semi-enclosed sea, an improving political environment and the common economic interests in the South China Sea region suggest that joint development may be an acceptable arrangement for the parties in the South China Sea dispute while the final solution to the sovereignty issues and maritime delimitation is still unlikely to be achieved in the coming time. Comprehensive state practice in many regions of the world also endorses this suggestion. However, due to the presence of multi-sovereignty claims and lack of confidence among the parties due to the military clashes, any cooperation mechanism in the South China Sea should be built with the purpose not only to accommodate a wide range of cooperation activities, but also to facilitate a forum for confidence building among the parties. This can be started with a form of a bureaucratic networking mechanism, to some extent similar to the way that the parties develop their cooperation in the Antarctica model.

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[670] Charles Robson, *op.cit.*, note 627, p.12.

CONCLUSION

Disputes concerning territorial and maritime claims between states are always complicated and protracted. This is absolutely true in the case of the South China Sea where an archipelago with hundreds of features lying in the middle of one of the biggest semi-enclosed seas of the world is under dispute. The availability of natural resources including fisheries, hydrocarbon deposits and a world nexus for navigation is the incentives behind the claims of the parties. Over the centuries, six claimants to the dispute, namely Brunei, China, Malaysia, the Philippines, Taiwan and Vietnam escalated their sovereignty claims even to low tide elevations and submerged features and maintain military occupation at all features. Multiple sovereignty claims also lead to potentially complicated maritime overlapping. So far, the sovereignty issue is still in deadlock and the same situation can be cited for maritime delimitation. Solutions to both the sovereignty and maritime issues of the dispute are assumed to be great difficult and complicated. However, this thesis has proved that the dispute is not as complicated as usually thought. Under the application of contemporary international law to the dispute feasible solutions are available for dispute settlement.

With regard to the subjects of the dispute, the application of Article 121 of the 1982 LOSC to the situation of the Spratlys results in a sharp reduction in the number of islands which qualify for territorial sovereignty claims under international law. Accordingly, of the hundreds of features of this archipelago, only 35 are islands and among them 12 potentially qualify under the test of Article 121(3) in generating full maritime zones. Taking into account that all the features of the Spratlys are tiny and uninhabited, these numbers are achieved by the most generous approach in the application of Article 121.

The Spratlys have been objects of sovereignty claims through centuries of historical upheaval in the region. The parties to the dispute have used various legal arguments including discovery, prescription, effective occupation, state succession, recognition, *estoppel* principle, proximity and the 1982 LOSC to support their sovereignty claims. However, the application of international law concerning territorial acquisition reveals that most of the legal arguments contain many weaknesses and may not have legal impact in

building titles for the parties. China and Taiwan claim the entire Spratlys on the basis of historical title, but their claims face the problem of authenticity and accuracy. Brunei and Malaysia claim a few features of which none may generate full maritime zones, on the groundless basis that these features are located on their continental shelves. The Philippines claims a large number of features, including 10 islands that may generate full maritime zones, based on 'discovery' and proximity. However, the 'discovery' which was conducted by an individual, without the endorsement of the Philippine government, and proximity were not sufficient to establish title for the Philippines under international law. Vietnam holds the strongest legal position with its claims on the basis of historical title from the official document of the Kingdom of Annam in the seventeenth and eighteenth centuries and of the successions from France in 1950 and from South Vietnam in 1976. The current occupation on the largest number of features of the Spratlys, including 5 islands which may generate full maritime zones, further consolidates the strongest position of Vietnam in the South China Sea dispute.

As the location of the Spratlys is at the middle of the South China Sea, the multiple sovereignty claims at the Spratlys' features create the most complicated case ever for maritime delimitation. The complication is even worse in the absence of a solution to the sovereignty issue. The thesis overcomes the sovereignty problem by formulating hypotheses; thereby a prospective maritime delimitation is mapped out under the contemporary international law concerning maritime delimitation. Taking into account the most complicated possibility from Chapter 2, that of 12 islands in the Spratlys generating full maritime zones and the existence of multiple sovereignty claims as analysed in Chapter 3, the maritime overlapping zones may be categorised into two main groups: EEZ and continental shelf overlapping between the mainland of littoral states and the 12 islands of the Spratlys, and EEZ and continental shelf overlapping among islands of the Spratlys themselves. It is well recognised that for maritime delimitation under international law the equidistance will be applied as a starting point in generating the provisional maritime boundary, thereafter, all relevant circumstances will be taken into account to adjust the meridian line for an equitable result. Applying this process to delimit the two groups of maritime overlapping in the South China Sea dispute, the equidistance line will be drawn as the provisional boundary. Then, the examination of all possible relevant circumstances, such as the effect of small islands, the access to fishery and hydrocarbon resources, the

effect of historic title of China and the Philippines and the navigation and security interests, reveals that there may be only one actual relevant circumstance, namely the presence of the tiny and uninhabited islands of the Spratlys. Hence, the islands of the Spratlys are likely given a reduced effect for the full effect of the mainland of littoral states in a maritime delimitation process between them. However, this is not the case for maritime delimitation among 12 islands of the Spratlys themselves. In this situation, the islands of the Spratlys have equal effect as the sources of entitlement for maritime zones, so that the equidistance lines are likely to be the maritime boundaries in maritime delimitation between them. The reduced effect of the Spratlys in maritime delimitation with littoral states shows that the actual complicated zone for maritime delimitation is the shaded area (a maritime area of the Spratlys after giving full effect to the mainland of littoral states). In order to arrive at some additional concrete prospects, further hypotheses are made on the basis of entitlement of the parties in this area. Accordingly, four maritime boundaries for this area are drawn on the basis of sovereignty claims and occupation of the parties over the Spratlys' features.

In addition to two main groups of overlapping, the Spratlys' features may create an exceptional overlapping between the maritime zones of their Article 121(3) islands, i.e. internal water, territorial sea, and contiguous zone, and the EEZ and continental shelf of the mainland of littoral states. These overlapping zones may be simply delimited by giving the islands of the Spratlys the enclaved effect.

The prospective maritime delimitation process reveals that the sovereignty claims of the parties over the Spratlys' features only serve two roles. On the one hand, it helps the parties generate entitlement to maritime space in the shaded zone. On the other, it enables encroaching on the maritime zones of the Philippines and Malaysia by the enclaving of some Article 121(3) islands. Thereby, with no Article 121(3) island located in their EEZ from the mainland, Vietnam, China and Taiwan will lose nothing from their maritime zones which are generated from their mainlands, but only gain more from any title established to the Spratlys' features. Only Malaysia, Brunei and the Philippines may lose some maritime zones due to the enclaving of some Article 121(3) features of the Spratlys, but that is immaterial loss. However, they can gain some more maritime space if they are successful with their sovereignty claims to some features of the Spratlys. All the extended maritime zones from the Spratlys will only be achieved if some features of the Spratlys are accepted to pass the test of Article 121(3). Ultimately, the sovereignty issue is only important and

complicated in generating maritime rights in the shaded area. Although the maritime boundaries are drawn on the basis of hypotheses since there is no definite maritime boundary in the absence of a solution to the sovereignty issue, the prospective maritime delimitation may help to reduce the illusion of the parties with regard to their ability to generate maritime zones of the Spratlys. This may clarify the non-existence of high sea in the South China Sea, resulting in the limitation of the number of the parties concerned. This conclusion may, therefore, help the parties to negotiate some kind of cooperation in order to better manage the South China Sea while waiting for a permanent solution to the sovereignty issue.

The prospects of the sovereignty and maritime issues reveal that Vietnam has some advantages of legal position, occupation and maritime delimitation in the dispute. Thus, relying on the recent precedent set by the *Barbados v. Trinidad and Tobago* case, one of the solutions to the South China Sea dispute could have been the unilateral submission by Vietnam to the dispute mechanism of the 1982 LOSC. However, due to the limitation which is recently made by China under Articles 298, such unilateral submission was a missed chance to settle the South China Sea dispute by a judicial institute.

Diplomatic measure towards a joint development regime is likely the only option for the parties concerned. Joint development has shown a success for states as a provisional arrangement for maritime dispute when the parties have yet to agree to a final solution, to cooperate in exploration and exploitation of the transboundary resources. This model is also suggested for the South China Sea in order to overcome the deadlock of the diplomatic attempt in the 1990s. Taking into account the availability of united and rich living and non-living resources of a semi-enclosed sea, an improving political environment and the common economic interests in the South China Sea region, joint development, or more broadly, joint cooperation is likely to be an acceptable arrangement for the parties in the South China Sea dispute while the final solution for sovereignty issue and maritime delimitation has yet to be reached. Through state practice and the particular situation of the South China Sea dispute, it is submitted that a suitable joint development regime should be built in the form of a bureaucratic networking mechanism. If the parties in the South China Sea are successful in applying a joint development mechanism in their dispute, this may prove another success of joint development, establishing a new trend in state practice in managing ocean resources and settling maritime dispute. With more consistent state

practice, joint development, a measure which is yet to be a legal obligation, may become an emerging rule of customary international law and offer another option for the parties to settle their maritime dispute.

ANNEX 1

Natural conditions of the Spratlys features[671]

1. North Danger Reefs

Name	Location	Natural conditions
Northeast Cay	11°28′N, 114°21′E	Area: 685x90m; Height: 3m; Covered with grass and thick trees in 1963
Southwest Cay	11°26′N, 114°20′E	Area: 650x280m; Height: 4-6m; Covered with a 10 metre coconut tree, grass with low bushes and guano with considerable scale. Also, reported to have two wells.
North Reef	11°28′N, 114°22′E	Above water only at low tide
South Reef	11°23′N, 114°18′E	Above water only at low tide
Trident Shoal	11°20′N, 114°42′E	Submerged atoll
Lys Shoal	11°20′N, 114°34′E	Submerged atoll

2. Thitu Reefs

Name	Location	Natural conditions
Thitu Island	11°03′N, 114°17′E	Area: 22ha; Height: 3.5m; Covered with low bushes, coconut palms and plantain trees
Sandy Cay	11°03′N,114°13′E	A low sand cay; fringing reef above water at high tide

3. Loaita Bank

Name	Location	Natural conditions
Loaita Island	10°41′N, 114°25′E	Area: 6ha; Height 2m; Covered with mangrove bushes in 1933, above which rose coconut palms and other small trees.
Lankiam Cay	10°44′N, 114°31′E	Area: a few hectares; A sand cay which above water at high tide
West York Island	11°05′N, 115°01′E	Area: 500x320m (15 ha); Covered with mangroves and coconut palms (1963)
Loaita Cay	10°44′N, 114°21′E	A sand cay, above water at high tide
Irving Reef	10°53′N, 114°56′E	Above water only at low tide
Subi Reef	10°54′N, 114°06′E	Above water only at low tide. Surrounded a lagoon
Menzies Reef	11°09′N, 114°49′E	Awash at low tide

[671] Mark J. Valencia *et al.*, *op.cit.*, note 16, Appendix 1, p.227; David Hancox and Victor Prescott, *op.cit.*, note 35 and Research of the Boundary Committee of Vietnam, *op.cit.*, note 41.

4. Tizard Bank

Name	Location	Natural conditions
Itu Aba Island	10°23′N, 114°21′E	Area: 960x400m (0.46km² or 46ha); Height: 5m; Covered with shrubs, coconut and mangroves in 1938 and have guano deposit
Sand Cay	10°23′N, 114°28′E	Area: 7ha; Height: 3m; Covered with trees and bushes in 1951
Eldad Reef	10°21′N, 114°42′E	Only a few large rocks are naturally above water at high tide
Nanyit Island	10°11′N, 114°22′E	Area: 104m²; Height: 6m; Covered with trees, bushes and grass
Gaven Reef	10°13′N, 114°12′E	A sand dune with 2 m height
Petley Reef	10°24′N, 114°34′E	Above water only at low tide
Whitsun Reef	10°00′N, 114°43′E	Some rocks naturally above water at high tide
Discovery Great Reef	10°10′N, 114°10′E	Several rocks above water at high tide; Most of the reef is above water at low tide
Discovery Small Reef	10°01′N, 114°02′E	Above water only at low tide

5. Union Reefs

Name	Location	Natural conditions
Sin Cowe Island	9°52′N, 114°19′E	Contained two sand cays, 4m and 2.5m height
Johnson South Reef	9°43′N, 114°18′E	Naturally above water only at low tide
Collins Reef	9°45′N, 114°14′E	Also known as Johnson North Reef, above water at high tide
Lansdowne Reef	9°46′N, 114°22′E	Sand dune with fringing reef
Loveless Reef	9°49′N, 114°16′E	Above water only at low tide
Hughes Reef	9°55′N, 114°30′E	Above water only at low tide
Higgens Reef	9°48′N, 114°24′E	Above water only at low tide
Kennan Reef	9°53′N, 114°27′E	Above water at low tide
Holiday Reef	9°49′N, 114°23′E	Above water only at low tide
Zhangxi Jiao	9°46′N, 114°24′E	Partly above water only at low tide

6. Jackson Atoll

Name	Location	Natural conditions
Flat Island	10°50′N, 115°49′E	Length from 90 to 210 m; A low flat, sandy cay with large guano deposit but no vegetation.
Nanshan Island	10°45′N, 115°49′E	575m length, 2.5m height; Covered with coconut trees, bushes and grass in 1963

7. London Reefs

Name	Location	Natural conditions
Spratly Island	8°38′N, 111°55′E	Area: 13-15ha; Height: 2.5m; Covered with bushes, grass, guano in 1963; Fringing reef is above water at low tide
West Reef	8°52′N, 112°15′E	East part is a sand cay with 0.6m height; West part is coral reef which is above water only at low tide. Between them is a lagoon
East Reef	8°52′N, 112°46′E	Rocks up to 1m height. Enclosed a lagoon
Cuateron Reef	8°53′N, 112°51′E	Coral rocks only; 1.5m at the highest; no lagoon
Central Reef	8°55′N, 112°24′E	Coral reef; Barely submerge at high tide, surrounded a lagoon
Ladd Reef	8°38′N, 111°40′E	Naturally above water only at low tide; Coral lagoon

8. Other independent features

Name	Location	Natural conditions
Fiery Cross Reef	9°37′N, 112°58′E	Coral reef, surrounded lagoon; Submerged at high tide except for one prominent rock 1m height at the southwest
Prince Consort Bank	7°56′N, 109°58′E	Coral reef that shallowest natural depth is 9m
Vanguard Bank	7°30′N, 109°35′E	Shallowest natural depth is 16m
Grainger Bank	7°52′N, 110°29′E	Shallowest natural depth is 9-11m
Prince of Wales Bank	8°04′N, 110°30′E	Shallowest natural depth is 7m
Bombay Castle	7°50′N, 111°40′E	Also known as Rifleman Bank; Sand and coral with shallowest natural depth of 3m
Amboyna Cay	7°51′N, 112°55′E	Area: 1.6ha; Height: 2m; Sand and coral with guano deposit and little vegetation. Surrounded by fringing reef
Barque Canada Reef	8°10′N, 113°18′E	Coral, highest rocks at 4.5m; 18m length; Much of the reef is above water at high tide; 21nm from Amboyna Cay
Pearson Reef	8°58′N, 113°41′E	Two sand cays, 2m and 1m height, lie on the edges of a lagoon; 14nm from Alison Reef
Alison Reef	8°51′N, 114°00′E	Naturally above water only at low tide. Enclosed a lagoon
Pigeon Reef	8°52′N, 114°39′E	Numerous rocks are naturally above the high water line; 24 nm from Cornwallis South Reef
Cornwallis South Reef	8°44′N, 114°11′E	Naturally above water only at low tide. Enclosed a lagoon
Investigator Shoal	8°08′N, 114°40′E	Large submerged atoll with an area of about 205 km²
Erica Reef	8°07′N, 114°10′E	Reef is above water only at low tide. Enclosed a lagoon 14 nm from Mariveles Reef
Mariveles Reef	7°59′N, 113°50′E	A sand cay; Height: 1.5-2m;surrounded by two lagoons; 35 nm from Barque Canada Reef

Dallas Reef	7°38′N, 113°48′E	Naturally above water only at low tide. Enclosed a lagoon; 5nm from Ardasier Reef
Ardasier Reef	7°38′N, 113°56′E	Naturally above water only at low tide. Enclosed a lagoon; 10 nm from Investigator Shoal
Swallow Reef	7°23′N, 113°48′E	Area: 6.2 ha; Height: 3m; Treeless cay and rocks; 14 nm from Dallas Reef
Royal Charlotte Reef	7°00′N, 113°35′E	A sand dune with no vegetation, plus rock ups to 1.2m height. Most of the reef is slightly submerged at high tide; 30 nm from Swallow Reef
Louisa Reef	6°20′N, 113°14′E	Few of rocks in the surface with 1m height; Reefs is 1.2nm length; 41 nm from Royal Charlotte Reef
Alicia Reef	9°25′N, 115°26′E	A sand cay, 1,2m height. Enclosed by a lagoon; 29 nm from Mischief Reef
Commodore Reef	8°21′N, 115°17′E	A sand cay, 0.5m height, surrounded by two lagoons; 28 nm from Investigator Shoal
Livock Reef	10°11′N, 115°18′E	Above water only at low tide; 28 nm from Jackson Atoll
Mischief Reef	9°55′N, 115°32′E	Some rocks above water at low tide; has a lagoon; 50 nm from Union Bank
Second Thomas Reef	9°43′N, 115°50′E	Submerged reef
First Thomas Shoal	9°20′N, 115°57′E	Above water at low tide. When the reef dries rocks standing one metre high help delineate a shallow linear lagoon; 27 nm from Alicia Reef
Half Moon Shoal	8°52′N, 116°16′E	Awash reef. Parts of the reef dry exposing a lagoon with depths down to 27 metres.
Boxall Reef	9°36′N, 116°11′E	Above water only at low tide
Royal Captain Shoal	9°01′N, 116°40′E	A few rocks are above water at low tide. Surrounds a lagoon
Reed Bank	11°20′N, 116°50′E	Shallowest natural depth is from 9-16m
Iroquois Reef	10°37′N, 116°10′E	Above water only at low tide
Bombay Shoal	9°26′N, 116°55′E	Several rocks are exposed at low tide. Surrounds a lagoon; 27 nm from First Thomas Shoal

ANNEX 2

Names of the occupied features in both English and occupant's name in Spratlys[672]

Occupant	*Feature occupied (in English name)*	*Feature occupied (in occupant's name)*	*Also claimed by*
China	Eldad Reef	Anda jiao	Taiwan, Vietnam
"	Mischief Reef	Dongmon jiao	Taiwan, Vietnam, the Philippines
"	First Thomas Shoal	Xinyi Jiao	"
"	Subi Reef	Zhubi jiao	"
"	Gaven Reefs	Nanxun jiao	"
"	Loai Ta Cay	Shuanghuang	"
	Whisun Reef		"
"	Johnson South Reef	Chigua jiao	"
"	Kennan Reef	Ximen jiao	"
"	Hughes Reef	Dongmen jiao	"
"	Cuarteron Reef	Huayang jiao	"
"	Fiery Cross Reef	Yongshu jiao	"
Taiwan	Itu Aba Island	Taiping dao	China, Vietnam
Vietnam	Southwest Cay	Đảo Song Tử Tây	China, Taiwan, the Philippines
"	South Reef	Đá Nam	"
"	Petley Reef	Đá Núi Thị	"
"	Sand Cay	Đảo Sơn Ca	"
"	Nam Yit Island	Đảo Nam Yết	"
"	Discovery Great Reef	Đảo Đá Lớn	"
"	Sin Cowe Island	Đảo Sinh Tồn	"
"	Sin Cowe East Island	Đảo Sinh Tồn Đông	"
"	Pigeon Reef	Đá Tiên Nữ	"
"	Cornwallis South Reef	Đá Núi Le	"
"	Alison Reef	Bãi Tốc Tan	"
"	Pearson Reef	Đá Phan Vinh	"
"	East Reef	Đá Đông	"
"	Central Reef	Đá Giữa	"
"	West Reef	Đá Tây	"
"	Barque Canada Reef	Bãi Thuyền Chài	China, Taiwan, the Philippines, Malaysia

[672] Compilation based on Odgaard, *op.cit.*, note 16, p. 77,78; Mark J. Valencia *et al.*, *op.cit.*, note 16, Plate 1, p.254 and Chemillier-Gendreau, *op.cit*, note 35, Appendix 4, p. 178.

"	Amboyna Cay	Đảo An Bang	"
"	Spratlys Island	Đảo Trường Sa	China, Taiwan
"	Lansdowns Reef	Đá Len Đao	"
"	Collins Reef	Đá Cô Lin	"
"	Sandy Cay	Đảo Sơn Ca	"
The Philippines	Northeast Cay	Parola	China, Taiwan, Vietnam
"	Thi Tu Island	Pagasa	"
"	West York Island	Likas	"
"	Lankiam Cay	Panata	"
"	Loaita Island	Kota	"
"	Nanshan Island	Lawak	"
"	Flat Island	Patag	"
"	Commodore Reef	Risal	China, Taiwan, Vietnam, Malaysia
Malaysia	Swallow Reef	Terumbu Layang Layang	China, Taiwan, Vietnam
"	Ardasier and Dallas Reefs	Terumbu Ubi	"
"	Mariveles Reef	Terumbu Mantanani	China, Taiwan, Vietnam, the Philippines
"	Louisa Reef	Barat Kecil	China, Taiwan, Vietnam, Brunei
"	Erica Reef	Terumbu Siput	"
"	Royal Charlotte Reef		"

ANNEX 3

Time and place of the South China Sea workshops[673]

Year	*Meetings*	*Venue*
1990	1st Workshop on Managing Potential Conflicts in the South China Sea	Bali, Indonesia
1991	2nd Workshop	Bangdung, Indonesia
1992	3rd Workshop	Yogyakarta, Indonesia
1993	4th Workshop	Surabaya, Indonesia
1994	5th Workshop	Bukittinggi, Indonesia
1995	6th Workshop	Balikapapan, Indonesia
1996	7th Workshop	Batam, Indonesia
1997	8th Workshop	Puncak, Indonesia
1998	9th Workshop	Jakarta, Indonesia
1999	10th Workshop	Bogor, Indonesia
2001	11th Workshop	Banten, Indonesia
2002	12th Workshop	Jakarta, Indonesia
2003	13th Workshop	Medan, Indonesia
2004	14th Workshop	The Philippines

[673] Adapted from Yann-Heui Song, "Cross-strait Interactions on the South China Sea Issues: A Need for CBMs" (2004) *Marine Policy* 7.

ANNEX 4

Time and venue of the meeting under TWG, GEM and study group

Year	*Meetings*	*Venue*
1993	TWG on Marine Scientific Research 1	Manila, Philipppines
	TWG on Marine Scientific Research 2	Surabaya, Indonesia
	TWG on Resource Assessment 1	Jakarta, Indonesia
1994	TWG on Marine Scientific Research 3	Singapore
	TWG on Marine Environmental Protection 1	Hangzhou, China
1995	TWG on Marine Scientific Research 4	Hanoi, Vietnam
	TWG on Safety Navigation 1	Jakarta, Indonesia
	TWG on Legal Matters 1	Phuket, Thailand
1996	TWG on Marine Scientific Research 5	Mactan, Cebu, Philippines
	TWG on Safety Navigation 2	Brunei Darussalam
	GEM on Biodiversity Protection	Cebu, Philippines
1997	TWG on Marine Environmental Protection 2	Hainan, China
	TWG on Legal Matters 2	Chiang Mai, Thailand
	GEM on Hydrographic Data and Information Exchange 1	Kuching, Sarawak, Malaysia
	GEM on Marine Environmental Protection 1	Phnom Penh, Cambodia
	GEM on Education and Training of Mariners 1	Singapore
1998	TWG on Marine Scientific Research 6	Manila, Philippines
	TWG on Resource Assessment 2	Jakarta, Indonesia
	TWG on Marine Environmental Protection 3	Manila, Philippines
	TWG on Safety Navigation 3	Singapore
	TWG on Legal Matters 3	Pattaya, Thailand
	GEM on Hydrographic Data and Information Exchange 2	Singapore
	GEM on Marine Environmental Protection 2	Manila, Philippines
	GEM on non-living and non-hydrocarbon resources	Jakarta, Indonesia
	Meeting of the Study Group on Zones of Co-operation in the South China Sea 1	Vientiane, Laos
1999	TWG on Legal Matters 4	Koh Samui, Thailand
	GEM on environmental Legislations	Shanghai, China
	GEM on Search and Rescue and Illegal Acts at Sea in the South China Sea	Kota Kinabalu, Sabah, Malaysia
	Meeting of the Study Group on Zones of Co-operation in the South China Sea 2	Tabann, Bali, Indonesia
2000	TWG on Legal Matters 5	Cha Am, Thailand
	GEM on Hydrographic Data and Information Exchange 3	Legian, Bali, Indonesia

BIBLIOGRAPHY

Primary Sources

Multilateral Treaties

Hague Convention II regarding the Laws of War: The Limitation of Employment of Force for Recovery of Contract Debts (1907).

Hague Convention III regarding the Laws of War: The Opening of Hostilities (1907).

Hague Convention IV respecting the Laws and Customs of War on Land (1907).

The Covenant of the League of Nations (1919).

Svalbard Treaty (1920).

The Kellogg-Briand Pact (1928).

Cairo Declaration of 27 November 1943.

Charter of the United Nations (1945) 892 INTS 119.

San Francisco Peace Treaty (1951).

Geneva Agreement on the Cessation of Hostilities in Vietnam (1954).

Convention on the Territorial Sea and the Contiguous zone (1958) 499 UNTS 311.

Antarctic Treaty (1959).

Agreement Measures for the Conservation of Antarctica Fauna and Flora (1964).

Vienna Convention on the Law of Treaties (1969) 1155 UNTS 331.

Convention on the Conservation of Antarctica Seals (1972).

Paris Peace Accords on Ending War and Restore Peace in Vietnam (1973).

Vienna Convention on Succession of States in Respect of Treaties (1978) 1946 UNTS 3.

Convention on the Conservation of Antarctica Marine Living Resources (1980).

United Nations Convention on the Law of the Sea (1982) 1833UNTS 3.

Protocol on Environmental Protection to the Antarctic Treaty (1991).

ASEAN Declaration on the South China Sea, Manila, Philippines, 22nd July 1992.

Agreement for the Implementation of the Provisions of the United Nations Convention on the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (1995).

Declaration on the Conduct of Parties in the South China Sea (2002).

Rules and Procedure of the Commission on the Limits of the Continental Shelf (hereafter Rules and Procedure), Doc. CLCS/40 of 2 July 2004.

Bilateral Agreements

Protectorate Treaty between France and Annam (1874).

Ly Frontier Agreement between France and China (1884).

Patenôtre Treaty between France and Annam (1884).

Sino-French Treaty of Land Border (1887).

Treaty of Peace between the United States and Spain (1898).

Treaty concerning the Boundary between the Philippines and Northern Borneo between the United Kingdom and the United States (1930).

Franco-Vietnamese Preliminary Convention (1946).

Bahrain-Saudi Arabia Boundary Agreement (1958).

Agreement on the partition of the neutral zone between Kuwait and Saudi Arabia (1965).

Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway relating to Delimitation the Continental Shelf between the Two Countries (1965).

Agreement concerning the Boundary Lines Dividing the Continental Shelf between Iran and Qatar (1969).

Agreement on Settlement of Maritime Boundary Lines and Sovereign Rights over Islands between Abu Dhabi and Qatar (1969).

Agreement between the Government of Canada and the Government of the French Republic on their Mutual Fishing Relations (1972).

Convention between the Government of the France Republic and the Government of the Spanish State on the Delimitation of the Continental Shelves between the Two States in the Bay of Biscay (1974).

Agreement between Japan and the Republic of Korea concerning the Establishment of Boundary in the Northern Part of the Continental Shelf adjacent to the Two Countries (1974).

Agreement between Sudan and Saudi Arabia relating to the Joint Exploitation of the Natural Resources of the Sea-bed and Sub-soil of the Red Sea in the Common Zone (1974).

Agreement between the government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Kingdom of Norway relating to the exploitation of the Frigg Field Reservoir and the transmission of gas there from to the United Kingdom, London 10 May 1976.

Treaty between Australia and the Independent State of Papua New Guinea concerning Sovereignty and Maritime Boundaries in the Area between the Two Countries, including the Area Known as Torres Strait, and the related matters (1978).

Memorandum of Understanding between the Kingdom of Thailand and Malaysia on the Delimitation of the Continental Shelf Boundary between the Two Countries in the Gulf of Thailand (1979).

Delimitation Treaty between the Government of the French Republic (Martinique and Guadeloupe) and the Government of the Republic of Venezuela (1980).

Treaty of Peace and Friendship between Chile and Argentina, (1985) 24 *ILM,* 11.

Timor Gap Treaty between Indonesia and Australia (1989).

Memorandum of Understanding between Malaysia and Vietnam (1992).

Maritime Delimitation Treaty between Jamaica and the Republic of Colombia (1993).

Management and Cooperation Agreement between the Government of the Republic of Senegal and the Government of the Republic of Guinea Bissau (1993).

Protocol to the Agreement of 14 October 1993, concerning the organization and operation of the Management and Cooperation Agency between Senegal and Guinea Bissau (1995).

Joint Declaration Cooperation over the Offshore Activities in the Southwest Atlantic between Argentina and the United Kingdom (1995).

Maritime Delimitation Treaty between Indonesia and Australia (1997).

Agreement between the People's Republic of China and the Socialist Republic of Vietnam on the Delimitation of Territorial Sea, the Exclusive Economic Zone and Continental Shelf in Beibu Bay/ Bacbo Gulf (2000).

Timor Sea Treaty between East Timor and Australia (2002).

National legislations

Territorial Water Act of Brunei (1982).

Fishery Limit Act of Brunei (1984).

Continental Shelf Act of Malaysia (1966).

Exclusive Economic Zone Act of Malaysia (1984).

Declaration on Territorial Sea of China (1958).

Law on the Territorial Sea and the Contiguous Zone of China of 25 February 1992.

Declaration of the Government of the People's Republic of China on the baseline of territorial sea, 15 May 1996.

Exclusive Economic Zone and Continental Shelf Act of China (1998).

1970 Reservation of Taiwan to the 1958 Convention on the Continental Shelf, (1971) 10 *ILM* 452.

Republic Act No.3046 of the Philippines (1961).

Republic Act No.5446 of the Philippines (1968).

Presidential Proclamation No.370 of 20 March 1968 Declaring as Subject to the Jurisdiction and control of the Republic of the Philippines all Mineral and other Natural Resources in the Continental Shelf.

Constitution of the Republic of the Philippines, in force since 17 January 1973.

Presidential Decree No. 1596 of the Philippines (1978).

Presidential Decree No. 1599 of the Philippines (1978).

Statement on the Territorial Sea, the Contiguous Zone, the Exclusive Zone and the Continental Shelf of Vietnam (1977).

Statement of 12 November 1982 by the Government of the Socialist Republic of Vietnam on the Territorial Sea Baseline of Vietnam.

Cases

Aegean Sea case, Judgment, ICJ Reports (1979), p.3.

Alaska v. US, 545 US 75, 125 S.Ct. 2137 (2005).

Asylum Case (Columbia/Peru), Judgment, ICJ Report (1950), p.266.

Case concerning maritime delimitation and territorial questions between Qatar and Bahrain, Judgment, ICJ Reports, (2001), 40.

Case concerning the Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland and France Republic, Decision of June 30, 1977, Report of the Arbitration Awards, (1979)18 *ILM* 339.

Case Concerning the Land and Maritime Boundary Between Cameroon and Nigeria (Cameroon v. Nigeria: Equatorial Guinea Intervening), Judgment, ICJ Reports (2002), 303.

*Clipperton Island Arbitration (France v Mexico)*2 RIAA 1105, also in (1932) 26 *AJIL 390.*

Continental Shelf Case (Libya v Malta), Judgment, ICJ Reports (1985), 13.

Continental Shelf Case (Tunisia v Libya) (Merits) Judgment, ICJ Reports (1982), 18.

Delimitation of the Maritime Boundary in the Gulf of Maine Area (US v Canada), Judgment, ICJ Reports (1984), 246.

Eastern Greenland Case (Denmark v Norway) (1933) PCIJ Series A/B no 53.

Fisheries Jurisdiction, Judgment, ICJ Reports (1951), 116.

Guinea/Guinea Bissau Maritime Delimitation Case (1986) 25 ILM 252.

Guinea-Bissau/Senegal Maritime Delimitation Arbitration Award (1989), reported in (1992) 31 *ILM* 36.

Island of Palmas case (1928) 2 RIAA, 829.

Maritime delimitation between Barbados v. The Republic of Trinidad and Tobago, Arbitration Award, 11 April 2006.

Maritime delimitation in the are between Greenland and Jan Mayen, Judgment, ICJ Reports (1993), 316.

Military and Paramilitary Activities in and against Nicaragua (Nicaragua v USA), Merits, Judgment ICJ Reports (1986), 14.

Miquiers and Ecrehos Case (France v UK) ICJ Reports (1953), 47.

North Continental Shelf case, Judgment, ICJ Reports (1969), 3.

Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia v Malaysia),Judgment, JCJ Reports (2002).

St Pierre and Miquelon Case (1992) 31 *ILM* 1145.

The Eritrea-Yemen arbitration awards 1998 and 1999, Permanent Court of Arbitration award series, (The Hague : T.M.C. Asser Press, 2005).

Western Sahara, Advisory Opinion, ICJ Report (1975), 12.

Secondary Sources

Books

Acharya, A., *A New Regional Order in South-East Asia: ASEAN in the Post-Cold War Era*, (Adelphi Paper, No. 219, Brassey, 1993).

Adede, A.O., *The System for Settlement of Disputes under the United Nations Convention on the Law of the Sea: A Drafting History and A Commentary,* (Dordrecht, Boston and Lancaster: Martinus Nijhoff Publishers, 1987).

Anderson, D., "Developments in Maritime Boundary Law and Practice" in Colson, D.A. and Smith, R.W. (eds.), *International Maritime Boundaries,* (Leiden, Boston: Martinus Nijhoff Publisher, 2005, Vol.5), p.3199.

Arenas, H.S., "The Future of the Antarctic Treaty- Thirty Years On" in Schofield, C.H. (ed.), *World Boundaries,* (London and New York: Routledge, Vol. 1,1994), p.98.

Attard, D.J., *The Exclusive Economic Zone in International Law,* (Oxford: Clarendon Press, 1987).

Auburn, F.M., Forbes, V. and Scott, J., "Comparative Oil and Gas Joint Development Regimes" in Grundy-Warr, C. (ed.), *World Boundaries,* (Vol.3, *Eurasia,* London: Routledge, 1994), p.196.

Ban Biên giới Chính phủ, Kết Quả Điều Tra về Điều Kiện Tự nhiên vùng Quần Đảo Trường Sa và các Vấn Đề Khoa Học Cần Giải Quyết trong Giai Đoạn 1993-1995, 1993, (Research of the Boundary Committee of Vietnam).

Beazley, P.B., "Coral Reefs and the 1982 Convention on the Law of the Sea" in Blake, G.H. (ed.), *World Boundaries,* (London: Roudledge, Vol.5., 1994), p.60.

Beck, B.J., "Antarctica: The Antarctica Treaty System after Thirty Years" in Schofield, C.H. (ed.), *World Boundaries,* (London and New York: Routledge, Vol. 1, 1994), p.76.

Bertrand, K.J., "Operational Considerations: The Historical Background" in Schatz, G.S., *Science, Technology, and Sovereignty in the Polar Regions,* (Toronto, London: Lexington Books, 1974).

Blake, G.H. *et al.* (eds.), *Boundaries and Energy: Problems and Prospects* (London, The Hague, Boston: Kluwer Law International, 1998).

Blake, G.H. *et al.* (eds.), *The Peaceful Management of Transboundary Resources,* (London: Graham & Trotman, 1995).

Blake, G.H. (ed.), *World Boundaries: Maritime Boundaries,* (London: Routledge, 1994, Vol.5).

Blake, G.H., *Maritime Boundaries and Ocean Resources,* (London: Croom Helm, 1987).

Blum, Y. Z., *Historic Titles in International Law,* (The Hague: Maritinus Nijhoff, 1965).

Bouchez, L.J., *Regime of Bays in International Law,* (Leyden, A.W.Sijthoff, 1964).

Bowett, D.W., "Islands, Rocks and Low Tide Elevations in Maritime Boundary Delimitations" in Charney, J.I. and Alexander, L.M., *International Maritime Boundaries,* (Dordrucht, Boston and London: Martinus Nijhoff Publishers, Vol.1, 1993), p.131.

Bowett, D.W., *The Legal Regime of Island in International Law,* (Netherlands: Sijthoff & Noordhoff, 1979).

Brown, E.D., *Seabed Energy and Minerals: The International Legal Regime: The Continental Shelf,* (Dordrecht: Martinus Nijhoff Publisher, Vol.1, 1992).

Brownlie, I., *Principles of International Law,* (Oxford: Clarendon Press, 6th ed., 2003).

Brownlie, I., *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations,* (The Hague, London, Boston: Martinus Nijhoff Publishers, 1998).

Brownlie, I., *International Law and the Use of Force by States,* (Oxford: Clarendon Press, 1963).

Bundy, R.R., "Natural Resource Development (Oil and Gas) and Boundary Disputes" in Blake G.H. *et al.* (eds.), *The Peaceful Management of Transboundary Resources,* (London, Dororecht and Boston: Martinus Nijhoff, 1995), p.22.

Bush, W.M., *Antarctica and International Law: A Collection of Inter-State and National Documents,* (London: Oceana Publications, Vol.III, 1988).

Buyer, M., *Custom, Power and the Power of Rules: International Relations and Customary International Law,* (Cambridge: Cambridge University Press, 1999).

Cameron (ed.), *Vietnam Crisis : A Documentary History,* (Ithaca and London : Cornell University Press, Vol.I, 1971).

Catley, B. and Keliat, M., *Spratlys: The Dispute in the South China Sea,* (Brookfield, Vermont: Ashgate, 1997).

Cats, H. (ed.), *Multiparty Mediation in a Complex World,* (United States Institute of Peace Press, 1999).

Center for Oceans Law and Policy, University of Virginia School of Law, *The UNCLOS 1982: A Commentary,* (Martinus Nijhoff Publishers, 1995).

Charney, J.I. and Smith, R., *International Maritime Boundaries,* (Martinus Nijhoff Publisher, Vol.4, 2003).

Charney, J.I. and Alexander, L.M., *International Maritime Boundaries,* (Dordrucht, Boston and London: Martinus Nijhoff Publishers, Vol.1- 3, 1993-8).

Chemillier-Gendreau, M., *La souveraineté sur les archipels Paracels et Spratleys,* (Paris: l'Harmattan, 1996).

Churchill, R., "Some Reflections on the Operation of the Dispute Settlement System of the UN Convention on the Law of the Sea Convention during its First Decade" in FreeStone, D., Barnes, R. and Ong, D. (eds.), *The Law of the Sea: Progress and Prospects,* (Oxford: Oxford University Press, 2006), p.388.

Churchill *et al.* (eds.), *New Directions in the Law of the Sea,* (London: British Institute of International and Comparative Law, 1977, Vol.5).

Churchill, R.R. and Lowe. A.V., *The Law of the Sea,* (Manchester University Press, 3rd ed., 1999).

Churchill, R.R. and Ulfstein, G., *Marine Management in Disputed Areas: The Case of the Barents Sea,* (London and New York: Routledge, 1992).

Collier, J. and Lowe, A.V., *The Settlement of Disputes in International Law: Institutions and Procedures*, (Oxford: Oxford University Press, 1999).

Colson, D. and Smith, R.W. (eds.), *International Maritime Boundaries,* (Leiden and Boston: Martinus Nijhoff Publisher, 2005, Vol.5).

Cook, P.J. and Carleton, C. (eds.), *Continental Shelf Limits: The Scientific and Legal Interface,* (Oxford: Oxford University Press, 2000).

Crawford, J., *The Creation of States in International Law,* (Oxford: Clarendon Press, 2nd ed., 2006).

Davis, E. and Wie, V., *China and the Law of the Sea Convention: Follow the Sea,* (Lewiston, Queenston and Lampeter: Edwin Mellen Press, 1995).

Djalal, H. and Townsend-Gault, I., "Preventive Diplomacy: Managing Potential Conflicts in the South China Sea" in Cats, H. (ed.), *Multiparty Mediation in a Complex World,* (United States Institute of Peace Press, 1999), p.113.

Dosman, E., *Sovereignty and Security in the Artic,* (London and New York: Routledge, 1989).

Dubner, B.H., *The Law of Territorial Waters of Mid-Ocean Archipelagos and Archipelagic States,* (The Hague: Martinus Nijhoff, 1976).

Dupont, A., *The Environment and Security in Pacific Asia,* (Oxford University Press, *Adelphin Paper 319,* 1998).

Evans, M.D., "Maritime Boundary Delimitation: Where Do We Go from Here?" in FreeStone, D., Barnes, R. and Ong, D. (eds.), *The Law of the Sea: Progress and Prospects,* (Oxford: Oxford University Press, 2006), p.137.

Evans, M.D., *Relevant Circumstances in Maritime Delimitation,* (Oxford: Clarendon Press, 1989).

Farrell, E.C., *The Socialist Republic of Vietnam and the Law of the Sea,* (The Hague: Martinus Nijhoff, 1998).

Fox, H., *et al.* (eds.), *Joint Development of Offshore Oil and Gas,* (British Institute of International and Comparative Law, 1989, Vol.1 and 2).

FreeStone, D., Barnes, R. and Ong, D. (eds.), *The Law of the Sea: Progress and Prospects,* (Oxford: Oxford University Press, 2006).

Gamble, J.K. and Pontecorvo, G. (eds.), *Law of the Sea: The Emerging Regime of the Oceans,* (Ballinger Publishing Company, 1974).

Ghee, L.T. and Valencia, M.J. (eds.), *Conflict over Natural Resources in South-East Asia and the Pacific,* (Singapore: Oxford University Press, 1990).

Gidel, *Le Droit International Public de la mer,* 1934.

Gravel (ed.), *The Pentagon Papers,* (Boston: Beacon Press, 1971, Vol.1), Chapter 1, p.18-19, online at http://www.mtholyoke.edu/acad/intrel/pentagon/int2.htm (accessed on 24 November 2004).

Greenfield, J., *China's Practice in the Law of the Sea,* (Oxford: Clarendon Press, 1992).

Harris, D. J., *Cases and Materials on International Law,* (London: Sweet & Maxwell, 1998).

Harrison, S., *China, Oil and Asia: Conflict Ahead,* (New York: Columbia University Press, 1992).

Heinzig, D., *Dispute Islands in the South China Sea,* (Hamburg Institute of Asian Affairs, 1976).

Hoang Sa and Truong Sa Archipelagoes (Paracels and Spratlys), (Hanoi: Vietnam Courier, 1985).

Hodgson, R.D., (Geographer of the Bureau of Intelligence and Research, US Department of State), "Islands: Normal and Special Circumstances" in Gamble J.K. and Pontecorvo G., *Law of the Sea: The Emerging Regime of the Oceans,* (Ballinger Publishing Company, 1974), p. 137.

Huynh, M.C., "Sovereignty of Vietnam over Hoang Sa (Paracels) and Truong Sa (Spratlys) and Peaceful Settlement of Disputes in the Bien Dong Sea (South China Sea)" in Institute for International Relations, *ASEAN in the 21st Century: Opportunities and Challenges* (Hanoi: Institute for International Relations, 1996).

Jayawardence, H., *The Regime of Islands in International Law,* (Dordrecht, Boston and London: Martinus Nijhoff Publisher, 1990).

Jennings and Watts (eds.), Oppenheim's International Law, (Harlow: Longman, Vol.1, 9th ed., 1992, Part 2).

Jennings, R., *The Acquisition of Territory in International Law,* (Manchester University Press, 1961).

John, B., *A Voyage to Cochinchina,* (T. Cadell and W Davies, 1806).

Johnson, C. and Elferink, A.G.O., "Submission to the CLCS in Cases of Unresolved Land and Maritime Dispute: The Significance of Article 76(10) of the LOS Convention", in FreeStone, D., Barnes, R. and Ong, D. (eds.), *The Law of the Sea: Progress and Prospects,* (Oxford: Oxford University Press, 2006), p.161.

Johnston, D.M. and Sounders, P.M., *Ocean Boundary Making: Regional Issues and Developments,* (London, New York and Sydney: Croom Helm, 1988).

Johnston, D.M. and Valencia, M.J., *Pacific Ocean Boundary Problem: Status and Solutions,* (London: Martinus Nijhoff Publishers, 1991).

Joyaux, F., *La Chine et le Réglement du Premier Conflit d'Indochine,* (Genève: Publication de la Sorbonne, 1979).

Joyner, C.C., *Antarctica and the Law of the Sea,* (Dordrecht, Boston, London: Martinus Nijhoff Publishers, 1992).

Kittichaisaree, K., *The Law of the Sea and Maritime Boundary Delimitation in Southeast Asia,* (New York: Oxford University Press, 1987).

Kivimaki, T. (ed.), *War or Peace in the South China Sea,* (Nias Press, 2002).

Klabbers J., *et al.* (eds.), *State Practice Regarding State Succession and Issues of Recognition,* (The Hague, London, Boston: Kluwer Law International, 1999).

Klein, N., *Dispute Settlement in the UN Convention on the Law of the Sea,* (Cambridge: Cambridge University Press, 2005).

Kontou, N., *The Termination and Revision of Treaties in the Light of New Customary International Law,* (Oxford: Clarendon Press, 1994).

Korman, S., *The Rights of Conquest: The Acquisition of Territory by Force in International Law and Practice,* (Oxford: Clarendon Press, 1996).

Kwiatkowska, B., "Economic and Environmental Considerations in Maritime Boundary Delimitations" in Charney, J. and Alexander, L., *International Maritime Boundaries,* (Martinus Nijhoff Publisher, Vol I, 1993), p.75.

Kwiakowska, B., *The 200 mile Exclusive Economic Zone in the New Law of the Sea,* (Dordrecht, Boston and London: Martinus Nijhoff Publishers, 1989).

Lagoni, R., *Report on Joint Development of Non-living Resources in the Exclusive Economic Zone,* (Warsaw: Warsaw Conference of the International Committee on the Exclusive Economic Zone, International Law Association, 1988).

Lapradelle, P., *La Frontiere: Enide de Droit International,* (Paris: Les Editions internationals, 1928).

Lauterpacht, *The Development of International Law by the International Court,* (London: Stevens & Sons Limited, 1958).

Lê, Q.Đ. *Miscellaneous Records on the Government of the Frontier,* (Book 2, 1776, *Classical Copy*).

Lee, L.T., *China and the South China Sea Dialogues,* (Westport Conn.: Praeger, 1999).

Lewis, J.W. and Litai, X., *China's Strategic Seapower: The Politics of Force Modernization in the Nuclear Age,* (Stanford: Stanford University Press, 1994).

Luu, V. L., *The Sino-Vietnamese Difference on the Hoang Sa and Truong Sa Archipelagos,* (Hanoi: The Gioi Publishers, 1996).

Luu, V.L., *Năm Mươi Năm Ngoại Giao Việt Nam,* (Hà Nội: Nhà Xuất Bản Công an Nhân dân, Tập 1, 1996).

Luu, V.L., *Cuộc Tranh chấp Việt-Trung về Hai Quần đảo Hoàng Sa và Trường Sa,* (Hà Nội: Nhà Xuất Bản Công an Nhân dân, 1995).

Madrolle, C., *La Question de Hainan et des Paracels,* (Revue Politique Etrangere, 1939).

Malanczuk, P., *Akehurst's Modern Introduction to International law,* (London and New York: Routledge, 7th ed.,1997).

Mangone, G.J., "Defining the Indefinable: Antarctic Maritime Boundaries" in Blake, G.H. (ed.), *Maritime Boundaries and Ocean Resources,* (London and Sydney: Croom Helm, 1987), p.227.

Marr, J.C., *Fishery and Resources Management in Southeast Asia,* (Washington D.C.: Resources for the Future, 1976).

Ministry of Foreign Affairs of Democratic of Vietnam, *White Book on Viet Nam's Sovereignty over the Hoang Sa and Truong Sa Archipelagos,* (Hanoi, 1979), also at UN Doc. A/34/541:S/13565, 19 October 1979.

Ministry of Foreign Affairs of the People's Republic of China, *China's Indisputable Sovereignty over Xisha and Nansha Island,* (Beijing: Foreign Languages Press, 1980).

Morgan, J.R. and Valencia, M. (eds.), *Atlas for Marine Policy in Southeast Asian Sea,* (University of California Press, 1983).

Muller, D., *China as a Maritime Power,* (Colorado: Wesview Press, 1983).

Nathan, A.J. and Robert, S. R., *The Great Wall and the Empty Fortress: China's Search for Security,* (New York: WW Norton, 1997).

Neff, S.C., *War and the Law of Nations: A General History,* (Cambridge: Cambridge University Press, 2005).

Newton, N. and Francis, C., "The Continental Shelf Commission" in Nordquist, M.H. and Moore, J.N. (eds.), *Oceans Policy: New Institutions, Challenges and Opportunities,* (The Hague : M. Nijhoff, 1999), p. 141.

Nguyen, H.T., *Những Điều Cần Biết về Luật Biển,* (Hà Nội: Nhà Xuất Bản Công An Nhân Dân, 1997).

Noer, J. H., *Chokepoints: Maritime Economic Concerns in the Southeast Asia,* (Washington: National Defense University Press, 1996).

Nordquist, M.H., *A Commentary,* (The Hague: Martinus Nijhoff Publishers, Vol.II, 1985).

O'Connell, D.P., *The International Law of the Sea,* (Oxford, Clarendon Press, Vol.I, 1982).

Oda (ed.), *International Law at the Times of its Codification: Essays in Honour of Roberto Ago,* (Milano : A. Giuffrè, Vol.2, 1987).

Office for Ocean Affairs and the Law of the Sea, *Baselines: An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea,* (1989).

Ogaard, L., *Maritime Security between China and Southeast Asia: Conflict and Cooperation in the Making of Regional Order,* (Ashgate, 2002).

Onorato, W.T., "A Case Study in Joint Development: The Saudi Arabia-Kuwait Partitioned Neutral Zone" in Valencia (ed.), *Geology and Hydrocarbon Potential of the South China Sea and Possibilities of Joint Development,* (Honolulu: East-West Center, 1985), p.539.

Park, C. (ed.), *The Law of the Sea in the 1980s,* (The Law of the Sea Institute, 1983).

Park, C., *East Asia and the Law of the Sea,* (Seoul: Seoul National University Press, 1983).

Peterson, M. J., *Recognition of Goverments: Legal Doctrine and State Practice, 1815-1995* (London: Macmillan Press Ltd., 1997).

Prescott, V., "Straight Baselines: Theory and Practice" in Brown, E.D. and Churchill, R.R. (eds.), *The UN Convention on the Law of the Sea: Impact and Implementation* (The Law of the Sea Institute, 1987), p.288.

Prescott, V., *The Maritime Political Boundaries of the World,* (London: Methuen, 1985).

Prescott, V. and Triggs, G., "Islands and Rocks and Their Role in Maritime Delimitation" in David Colson and Robert W. Smith (eds.), *International Maritime Boundaries,* (Leiden and Boston: Martinus Nijhoff Publisher, 2005, Vol.5), p.3245.

Prescott, V., *The South China Sea: Limits of National Claims,* (Maritime Institute of Malaysia, 1996).

Reisman, W.M. and Westerman, G.S., *Straight Baselines in International Maritime Boundary Delimitation,* (Macmillan, 1992).

Roach, A.J. and Smith, R.W., *United States Responses to Excessive Maritime Claims,* (Boston: Martinus Nijhoff, 2nd ed., 1996).

Robson, C., "Transboundary Petroleum Reservoirs: Legal Issues and Solutions" in Blake, G.H. *et al.* (eds.), *The Peaceful Management of Transboundary Resources,* (London, Dororecht, Boston: Martinus Nijhoff, 1995), p.3.

Romania's Draft on definition of and regime applicable to islets and islands similar to islets, Document A/CONF.62/C.2/L.53 in United Nations, *Third United Nations Conference on the Law of the Sea: Official Record,* Vol.III, p.228.

Samuels, M., *Contest for the South China Sea*, (New York: Methuen, 1982).

Sanger, C., *Ordering the Oceans: The Making of the Law of the Sea*, (Toronto: University of Toronto Press, 1987).

Schofield, C.H. (ed.), *World Boundaries: Global Boundaries,* (London: Routledge, Vol.1, 1994).

Schofield, C.H. *et al.* (eds.), *The Razor's Edge,* (London, The Hague, New York: Kluwer Law International, 2002).

Shaw, M., *International Law,* (Cambridge: Grotius Publication, 5th ed., 2003).

Slater, I., *WWIII: South China Sea,* (New York: Ballantine Books, 1996).

Smith, R.W. and Taft, G., "Legal Aspects of the Continental Shelf" in Cook, P.J. and Carleton, C.M. (eds.), *Continental Shelf Limits: The Scientific and Legal Interface,* (Oxford: Oxford University Press, 2000), p.17.

Souza, G.B., *The Survival of Empire: Portuguese Trade and Society in China and the South China Sea 1630-1754,* (London: Cambridge University Press, 1986).

Strati, A., "Potential Areas for Joint Development" in Fox, H. e*t al., Joint Development of Offshore Oil and Gas,* (British Institute of International and Comparative Law, 1989, Vol.2), p.109.

Symmons, C.R., *The Maritime Zones of Islands in International Law,* (London: Martius Nijhoff Publishers, 1979).

Talmon, S., *Recognition of Governments in International Law: With Particular Reference to Government in Exile,* (Oxford: Clarendon Press, 1998).

Tangsubkul, P., *ASEAN and the Law of the Sea,* (Singapore: Institute of Southeast Asia Studies, 1982).

Theutenberg, B.J., *The Evolution of the Law of the Sea: A Study of Resources and Strategy with Special Regard to the Polar Regions,* (Dublin: Tycooly International Publishing Limited, 1984).

Thirlway, H.W.A., *International Customary Law and Codification,* (Leiden: A.W. Sijthoff, 1972).

Townsend-Gault, I. and Stormont, W.G., "Offshore Petroleum Joint Development Arrangement: Functional Instrument? Compromise? Obligation?" in Blake, G.H. (ed.), *The Peaceful Management of transboundary resources,* (London: Graham Le Trotman, 1995), p.51.

UN Publications, *The Law of the Sea: Baselines - An Examination of the Relevant Provisions of the United Nations Convention on the Law of the Sea* (1989).

United Nations, *The Law of the Sea: Baselines - National Legislation with Illustrative Maps,* (Office for Ocean Affairs and the Law of the Sea, 1989).

United Nations, *The Law of the Sea: Definition of the Continental Shelf - An Examination the Relevant Provisions of the United Nations Convention on the Law of the Sea,* (New York: UN Publication, 1993).

United Nations, *The Law of the Sea: United Nations Convention on the Law of the Sea with Index and Final Act of the Third United Nations Conference on the Law of the Sea,* (New York: UN Publication, 1983).

Valencia, M. and Dyke. J.V., "Comprehensive Solutions to the South China Sea Disputes: Some Options" in Blake G.H. *et al.* (eds.), *Boundaries and Energy: Problems and Prospects*, (London: Kluwer Law International, 1998), p. 85.

Valencia, M., Dyke, J.V. and Ludwig N., *Sharing the Resources of the South China Sea.* (The Hague: Martinus Nijhoff, 1997).

Valencia, M.J., *China and the South China Sea Dispute: Conflicting Claims and Potential Solutions in the South China Sea*, (Oxford: Oxford University Press, *Adelphi Paper*, No. 298, 1995).

Valencia, M.J., *Malaysia and the Law of the Sea,* (Kuala Lumpur: Institute of Strategic and International Studies of Malaysia, 1991).

Vicuna, O., *The Exclusive Economic Zone*, (Cambridge: Cambridge University Press, 1989).

Villiger, M.E., *Customary International Law and Treaties,* (Dordrecht, Boston and Lancaster: Martinus Nijhoff Publishers, 1985).

Weil, P., *The Law of Maritime Delimitation - Reflection,* (Cambridge: Grotius Publications Limited, 1989).

Wolfke, K., *Custom in Present International Law,* (Dordrecht, Boston and London: Martinus Nijhoff Publisher, 2nd ed., 1993).

Yu, P.K., "Itu Aba Island and the Spratlys Conflict" in Grundy-Warr, C. (ed.), *World Boundaries*, (London: Routledge, Vol.3, 1994), p.183.

Zimmermann, A., "State Succession in Respect of Treaties" in Klabbers, J. *et al.* (eds.), *State Practice Regarding State Succession and Issues of Recognition,* (The Hague, London, Boston: Kluwer Law International, 1999).

Periodicals

Antunes, "The 1999 Eritrea-Yemen Maritime Delimitation Award and the Development of International Law" (2001) 50 *ICLQ* 299.

Beazley, P.B., "Reefs and the 1982 Convention on the Law of the Sea" (1991) 6(4) *IJECL* 281.

Beller, R. D., "Analysing the Relationship between International Law and International Politics in China's and Vietnam's Territorial Dispute over the Spratlys Islands" (1994) 29 *Tex. Int'l L. J.* 293.

Bennett, M., "The People's Republic of China and the Use of International Law in the Spratly Islands Dispute" (1991-2) 28 *Stan J. Int'l L.* 425.

Blanche, B. and Blanche, J., "Oil and Regional Stability in the South China Sea" *Jane's Intelligence Rev.*, Nov.1, 1995.

Bleicher, S.A., "The Legal Significance of Re-citation of General Assembly Resolutions" (1969) 63 *AJIL* 444.

Boyle, A. E., "Dispute Settlement and the Law of the Sea Convention: Problems of Fragmentation and Jurisdiction" (1997) 46(1) *ICLQ* 37.

Bowett, "Reservations to Non-restricted Multilateral Treaties" (1976-7) 48 *BYIL* 66.

Briscoe, J., "Islands in Maritime Boundary Delimitation" (1988) *Ocean Yearbook* 14.

Brown, E. D., "Dispute Settlement and the Law of the Sea: The UN Convention Regime" (1997) 21(1) *Marine Policy* 17.

Brown, E.D., "Rockall and the Limits of National Jurisdiction of the UK" (1978) *Marine Policy* 205 (Part I).

Chang, T., "China's Claim of Sovereignty over Spratly and Paracels Islands: A Historical and Legal Perspective" (1991) 23 *Case W. Res. J. Int'l L.* 339.

Charney, J., "Rocks that Cannot Sustain Human Habitation" (1999) 93(4) *AIIL* 863.

Charney, J., "The Implications of Expanding International Dispute Settlement Systems: the 1982 Convention on the Law of the Sea" (1996) 90 *AJIL* 69.

Charney, J., "Ocean Boundaries between Nations: A Theory for Progress" (1984) 78 *AIJL* 582.

Charney, J., "Progress in International Maritime Delimitation Law" (1994) 88(2) *AJIL* 227.

Chen, H., "A Comparison Between Taipei and Peiking in Their Policies and Concepts Regarding the South China Sea" (9/2003) *Issues and Studies* 22.

Chen, H., "The Prospects for Joint Development in the South China Sea" (12/1991) *Issues and Studies* 112.

Chen, J., "China's Spratly policy with Special Reference to the Philippines and Malaysia" (1994) 34 *Asian Survey,* 893.

Cheng, T., "The Dispute over the South China Sea Islands" (1975) 10 *Tex. Int'l L. J.* 265.

Cheng-yi, L., "Taiwan's South China Sea Policy" (4/1997) 37(4) *Asian Survey* 323.

China's Ministry of Foreign Affairs, *China's Indisputable over the Xisha and Nansha Islands,* (Beijing, 1980) in (1980) 21 *Beijing Review.*

Churchill, "Falkland Islands- Maritime Jurisdiction and Co-operative Arrangements with Argentina" (1997) 46 *ICQL* 463.

Clagett, B.M., "Competing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the South China Sea." (1995) 10 *Oil Gas Law and Taxation Review* 375 (Part I).

Clagett, B.M., "Competing Claims of Vietnam and China in the Vanguard Bank and Blue Dragon Areas of the South China Sea." (1995) 10 *Oil Gas Law and Taxation Review* 419 (Part II).

Colson, D.A., "The Delimitation of the Outer Continental Shelf between Neighbouring States" (2003) 97 *AJIL* 91.

Cordner, L.G., "The Spratly Islands Dispute and the Law of the Sea" (1994) 25(1) *ODIL* 61.

Cui, W., "Multilateral Management as a Fair Solution to the Spratlys Dispute" (2003) 36 *Vand. J. Transnat'l L.* 799.

Dickinson, "Arbitral Award on the Subject of the Difference Relative to the sovereignty over Clipperton Island" (1932) 26(2) *AJIL* 390.

Djalal, H., "Indonesia and the South China Sea Initiative" (2001) 32(2) *ODIL* 97.

Djalal, H., "Conflicting Territorial and Jurisdictional Claims in the South China Sea" (1979) 7 *Indonesian Quarterly* 3.

Djalal, H., "Indonesia and the South China Sea Initiative" (2001) (32) *ODIL* 97.

Dubner, H., "The Spratly "Rock" Dispute- A "Rockapelago" Defies Norms of International Law" (1995) 9 *Temp Int'l & Comp. L. J.* 291.

Dyke, J.V. and Bennett, D.L., "Islands and the Delimitation of Ocean Space in the South China Sea" (1993) 10 *Ocean Yearbook* 54.

Dyke, J.V., Morgan, J.R. and Gurish, J. "The Exclusive Economic Zone of the Northwestern Hawaiian Islands: When Do Uninhabited Islands Generate an EEZ?" (1988) 25 *San Diego L. R.* 425.

Dzurek, D. J., "The Spratly Islands Dispute: Who's On First?" (1996) 2(1) *Maritime Briefing.*

Elferink, A.G.O., "Clarifying Article 121(3) of the Law of the Sea Convention: The Limits Set by the Nature of International Legal Process" (1998) *Boundary and Security Bulletins* 58.

Elferink, A.G.O., "The Islands in the South China Sea: How Does Their Presence Limit the Extent of the High Seas and the Area and the Maritime Zones of the Mainland Coast?" (2001) 32(2) *ODIL* 169.

Ely, "The Conservation of Oil" (1937-8) 51 *Harv. L. Rev.*1209.

Er, L.P., "Japan and the Spratlys Dispute: Aspirations and Limitations" (1996) 36(10) *Asian Survey* 995.

Evans, M.D., "Cases concerning Maritime Delimitation in Area between Greenland and Jan Mayen (Denmark v. Norway)" (1994) 43 *ICLQ* 697.

Evans, M.D., "Less than an Ocean Apart: The St Pierre and Miquelon and Jan Mayen Islands and the Delimitation of Maritime Zones" (1994) 43 *ICLQ* 678.

Evans, M.D., "Maritime Delimitation and Expanding Categories of Relevant Circumstances" (1991) 40 *ICQL* 1.

Evans, M.D., "Delimitation and the Common Maritime Boundary" (1993) 64 *BYIL* 283.

Evans, M.D., "Maritime Delimitation and Expanding Categories of Relevant Circumstances" (1991) 40 *ICQL* 1.

Falk, R.A., "On the Quasi-legislative Competence of the General Assembly" (1966) 60 *AJIL* 782.

Fitzmaurice, "The Law and Procedure of the International Court of Justice 1951-4: Treaty Interpretation and other Treaty Points" (1957) 33 *BYIL* 203.

Friedmann, W., "The North Sea Continental Shelf Case- A Critique" (1970) 64 *AJIL* 229.

Geoffrey, M., "Low Tide Elevations and Straight Baselines" (1972-1973) 46 *BYIL* 405.

Geoffrey, M., "Abandonment of Territorial Claims: The Cases of Bouvet and Spratlys Islands" (1986) *BYIL* 337.

Gjetnes, M., "The Spratlys: Are They Rocks or Islands?" (2001) 32(2) *ODIL* 191.

Gutzlaff, "Geography of the Cochinchinese Empire" (1849) Vol. XIX *Journal of the Geographical Society of London* 93.

Haller-Trost, R., "Some Comments on Territorial sea and Continental Shelf Maps of Malaysia" (1996) 12 *Ocean Yearbook* 316.

Hancox, D. and Prescott, V., "A Geographical Description of the Spratly Islands and an Account of Hydrographic Surveys Among Those Islands" (1995) 6(1) *Maritime Briefing.*

Hardwicke, "The Rule of Capture and Its Implications as Applied to Oil and Gas" (1935) 13 *Tex. L. Rev.* 391.

Hearns, G. S. And Stormont W. G., "Report: Managing Potential Conflicts in the South China Sea" (1996) 20(2) *Marine Policy* 177.

Herman, L.L., "The Couth Giveth and the Court Taketh Away: An Analysis of the Tunisia-Libya Continental Shelf Case" (1984) 33 *ICQL* 825.

Hodgson and Smith, "The Informal Single Negotiating Text (Committee II): A Geographical Perspective" (1976) 3 *ODIL* 225.

Hosni, S.M., "Partition of the Neutral Zone" (1966) 60 *AJIL* 735.

Hutchison, J.R., "The South China Sea: Confusion in Complexity" (2004) *Critique: A Worldwide Student Journal of Politics.*

Hyer, E., "The South China Sea Disputes: Implications of Chinas Earlier Territorial Settlements" (1995) 68(1) *Pacific Affairs* 34.

Jean-Louis, "Notes on the Geography of Cochinchina" (1837) VI (Part II) *Journal of the Asiatic Society of Bengal* 737.

Jean-Pierre, "Le conflit des Iles Paracels et le problème de la souveraineté sur les iles inhabitées" (1975) *Annuaire Francaiis de Droit International* 173.

Jinming, L. and Dexia, L., "The Dotted Line on the Chinese Map of the South China Sea: A Note" (2003) 34 *ODIL* 287.

Johnson D.N.H., "Artificial island" (1951) 4 *ILQ* 203

Joyner, C.C., "The Spratly Islands Dispute: Rethinking the Interplay of Law, Diplomacy, and Geo-politics in the South China Sea" (1998) 13(2) *IJMCL*193

Joyner, C.C., "UN General Assembly Resolutions and International Law: Rethinking the contemporary dynamics of norm-creation" (1981) *Cal. W. Int'l L. J.* 452.

Karagiannis, "Les Rochers qui ne se Prêtent pas à l'Habitation Humaine ou à une Vie Économique Propre et le Droit de la Mer" (1996) 29 *Revue Belge de Droit International* 559.

Kawaley, I., "Delimitation of Islands Fringed with Reefs: Article 6 of the 1982 Law of the Sea Convention" (1992) 41(1) *ICQL* 152.

Kaye, S., "The Timor Gap Treaty: Creative Solutions and International Conflict" (1994) 16 *Sydney L. Rev.* 72.

Kaye, S., "The Use of Multiple Boundaries in Maritime Boundary Delimitation: Law and Practice" (1998) 49 *AYIL* 49.

Kelly, T.C., "Vietnam Claims to the Truong Sa Archipelago [Ed. Spratlys Islands]" (1999) 3(3) *Exploitations in the Southeast Asian Studies,* online at http://www.hawaii.edu/cseas/pubs/explore/v3/todd.html (accessed on 24 November, 2004).

Keyuan, Z., "Historic Rights in International Law and in China's Practice" (2001) 32 *ODIL* 149.

Keyuan, Z., "The Chinese Traditional Maritime Boundary Line in the South China Sea and its Legal Consequences for the Resolution of the Dispute over the Spratly Islands" (1999) 14(1) *IJMCL* 27.

Kittichaisaree, K., "A Code of Conduct for Human and Regional Security around the South China Sea" (2001) 32(2) *ODIL* 131.

Kwiatkowska and Soons, "Entitlement to Maritime Areas of Rocks which Cannot Sustain Human Habitation or Economic Life of their Own" (1990) 21 *NYIL* 174.

Lagoni, "Interim Measures Pending Maritime Delimitation Agreements" (1984) 78 *AJIL* 345.

Lagoni, "Oil and Gas Deposits across National Frontiers" (1979) 73 *AJIL* 215.

Lauterpacht, "Sovereignty over Submarine Areas" (1950) 27 *BYIL* 417.

Lavalle, R., "Not Quite a Sure Thing: The Maritime Areas of Rocks and Low-tide Elevations under the UN Law of the Sea Convention" (2004) 19(1) *IJCML* 43.

Lin, C., "Taiwan's South China Sea Policy" (1997) 37(4) *Asian Survey* 323.

Liu, C., "Chinese Sovereignty and Joint Development: A Pragmatic Solution to the Spratly Islands Dispute" (1996) 18 *Loy. L.A. Int'l & Comp. L.J.* 865.

Macnab, R., "The Case for Transparency in the Delimitation of the Outer Continental Shelf in Accordance with UNCLOS Article 76" (2004) 35(1) *ODIL* 1.

McDorman, T.L., "The Role of the Commission on the Limits of the Continental Shelf: A Technical Body in a Political World" (2002) 17(3) *IJMCL* 301.

Merrills, J., "Sovereignty over Pulau Ligitan and Pulau Sipadan (*Indonesia v. Malaysia*): The Philippines' Intervention" (2002) 51 *ICLQ* 718.

Merrills, J., "Sovereignty over Pulau Ligitan and Pulau Sipadan (*Indonesia v. Malaysia*), Merits, Judgment of 17 December 2002" (2003) 52 *ICLQ* 797.

Milivojevic, M., "The Spratly and Paracel Islands Conflict" (1989) January-February *Survival* 76.

Mito, L.A., "The Timor Gap Treaty as a Model for Joint Development in the Spratly Islands" (1998) 13 *Am. U. Int'l L. Rev.* 727.

Miyoshi, "The Basis Concept of Joint Development of Hydrocarbon Resources on the Continental Shelf: With Special Reference to the Discussions at the East-West Centre Workshops on the South-East Asian Seas" (1988) 3 *IJECL* 1.

Miyoshi, "The Joint Development of Offshore Oil and Gas in Relation to maritime boundary delimitation" (1999) 5 *Maritime Briefing* 3.

Morris, "North Sea Continental Shelf: Oil and Gas Problems" (1967-1968) 2 *International Lawyer* 190.

Morton, B. and Blackmore, G., "South China Sea" (2001) 42 (12) *Marine Pollution Bulletin* 1236.

Murphy, B.K., "Dangerous Ground: The Spratly Islands and International Law" (1994-1995) 1 *Ocean & Coastal L. J.* 187.

Næss, T., "Environmental Cooperation around the South China Sea: The Experience of the South China Sea Workshops and the United National Environment Programme's Strategic Action Programme" (2001) 14(4) *The Pacific Review* 553.

Nelson, L.D.M, "The Roles of Equity in the Delimitation of Maritime Boundaries" (1990) 84 *AJIL* 837.

Nguyen, H.T., "Vietnam and the Code of Conduct for the South China Sea" (2001) 32(2) *ODIL* 105.

Nguyen, H.T., "The 2002 Declaration on the Conduct of the Parties in the South China Sea: A Note" (2003) 34 *ODIL* 279.

Nordhaug, K., "Explaining Taiwan's policies in the South China Sea" (1988-99) 14(4) *The Pacific Review* 487.

Nossum, J.H., "What Vietnam Could Gain From Redrawing Its Baselines" (2001) 9(4) *Boundary and Security Bulletin*, online at www-ibru.dur.ac.uk/pubs/bsb.html#BSB9

Oda, S., "Dispute Settlement Prospects in the Law of the Sea" (1995) 44(4) *ICLQ* 863.

Ong, D., "Joint Development of Common Offshore Oil and Gas Deposits: "Mere" State Practice or Customary International Law?" (1999) 93(4) *AJIL* 771.

Onorato, W.T., "Apportionment of an International Common Petroleum Deposit" (1977) 26 *ICLQ* 337.

Report of the ILC on the Work of its 18th Section (1966) 2 *Yearbook of the International Law Commission* 172.

Roque, H.H.L., "China's Claim to the Spratlys Islands under International Law" (1997) 15 *Energy Natural Resources* 189.

Schwarzenberger, G., "Title to Territory: Response to a Challenge" 51 (1957) *AJIL* 308.

Scobbie, I., "The Spratlys Islands Dispute: An Alternative View" (1996) 5 *Oil and Gas Law and Taxation Review* 173.

Sharma, S.P., "Relevance of the 'Contiguity' Doctrine to International Disputes including the Spratly Dispute" (1992) *Journal of Malaysia Comparative Law* 81.

Shen, J., "International Law Rules and Historical Evidences Supporting China's Title to the South China Sea Islands" (1997-8) 21 *Hasting Int'l& Comp. L. R.* 1.

Sloan, B., "General Assembly Resolutions Revisited" (1987) 58 *BYIL* 39.

Snyder, C., "The Implications of Hydrocarbon Development in the South China Sea" online at http://faculty.law.ubc.ca/scs/ (accessed on 24 November 2005).

Song, Y., "China's Marine Policy: EEZ and Marine Policy" (1989) 24(10) *Asian Survey* 983.

Song, Y., "Codes of Conduct in the South China Sea and Taiwan's Stand" 24 (2000) *Marine Policy* 449.

Song, Y., "Cross-strait Interactions on the South China Sea Issues: A Need for CBMs" (2004) *Marine Policy* 7.

Song, Y., "The Overall Situation in the South China Sea in the New Millennium: Before and After the September 11 Terrorist Attacks" (2003) 34 *ODIL* 229.

Soon, K., "Free the Tropical Seas: An Ice-cool Prescription for the Burning Spratly Issues" (1996) 20(3) *Marine Policy* 199.

Storey, I.J., "Manila Looks to USA for Help over Spratlys" (1999) 11(8) *Jane's Intelligence Review* 46, online at:

http://www.janes.com/regional_news/asia_pacific/news/jir/jir990923_1_n.shtml

Storey, I.J., "Living with the Colossus: How Southeast Asian Countries Cope with China" (1999-2000) *Parameters* 111.

Stormont, W.G., "Managing Potential Conflicts in the South China Sea." (1994) 18(4) *Marine Policy* 353.

Sun, K., "Dawn in the South China Sea? A Relocation of the Spratly Islands in an Everlasting Legal Storm" (1990) 16 *SAYIL* 32.

Sun, K., "Freeze the Tropical Seas: An Ice-cool Prescription for the Burning Spratly Issues" (1996) 20(3) *Marine Policy* 199.

Sun, K., "The Policy of the Republic of China Towards the South China Sea" (1995) 19(5) *Marine Policy* 401.

Symmons, C., "Some Problems relating to the Definition of "Insular Formations" in International Law: Islands and Low-tide Elevations" (1995) 5(1) *Maritime Briefing.*

Tanaka, Y., "Reflections on Maritime Delimitation in the Cameroon/Nigeria Case" (2004) 53 *ICLQ* 369.

Tanaka, Y., "Reflections on Maritime Delimitation in the Qatar/Bahrain Case" (2003) 52 *ICLQ* 53.

Tanaka, Y., "Reflection on the Concept of Proportionality in the Law of Maritime Delimitation", (2001) 3(16) *IJMCL* 433.

Tønnesson, S., "Can Conflicts Be Solved by Shelving Disputes?" (1999) 30(2) *Security Dialogue* 179.

Tønnesson, S., "Here's How to Settle Rocky Disputes in the South China Sea" *International Herald Tribune*, 6 September 2000.

Triggs, G. and Bialek, D., "The New Timor Sea Treaty and Interim Arrangements for Joint Development of Petroleum Resources of the Timor Gap" (2002) 3 *Melb. J. Int'l L.* 322.

UN Doc. A/CN.4/143, 9 March 1962, titled "Judicial Regime of Historic Waters, Including Historic Bays", (1962) 2 *Yearbook of the International Law Commission,* p.3

Valencia, M., "Regional Maritime Regime Building: Prospects in Northeast and Southeast Asia" (2000) 31 *ODIL* 223.

Valencia, M., "Taming Troubled Waters: Joint Development of Oil and Mineral Resources in Overlapping Claim Areas" (1986) 23 *San Diego L. Rev.* 661.

Valencia, M., The South China Sea: Prospects for Marine Regionalism (1978) 4 *Marine Policy* 87.

Valero, G.M.C., "Spratly Archipelago Dispute: Is the Question of Sovereignty Still Relevant?" (1994) 18(4) *Marine Policy* 314.

Waldock, "Disputed Sovereignty to the Falkland Islands Dependencies" (1948) 25 *BYIL* 342.

Wang, H., "China's Oil-policy and its Impact" (1995) 23(7) *Energy Policy* 627.

Wang, K., "Bridge over Troubled Waters: Fisheries Cooperation as a Resolution to the South China Sea Conflicts" (2001) 14(4) *The Pacific Review* 531.

Weil, P., "Towards Relative Normativity in International Law?" (1983) 77 *AJIL* 413.

Willis, L.A., "From the Precedent to Precedent: The Triumph of Pragmatism in the Law of Maritime Boundaries" (1986) 24 *Canadian Yearbook of International Law* 3.

Zha, D., "Localizing the South China Sea Problems: the Case of China's Hainan" (2001) 14(4) *The Pacific Review* 578.

Zhao. S., "Chinese Intellectuals' Quest for National Greatness and Nationalistic Writing in the 1990s" (1997) 152 *The China Quarterly* 725.

Unpublished documents

Beckman, R., Presentation in the 5th Science Council of Asia Conference, Hanoi, May 11-13, 2005.

Gjetnes, M., The Legal Regime of Islands in the South China Sea, Masters Thesis of Law, Department of Public and International Law, University of Oslo, 2000.

Hamzah, B.A., "Conflicting Jurisdiction Problems in the Spratlys: Scope for Conflict Resolution", Paper presented in the Second Workshop on Managing Potential Conflicts in the South China Sea, Bandung, Indonesia, 15-18 July 1991.

Joyner, C.C., "Toward a Spratly Resource Development Authority: Precursor Agreements and Confidence-Building Measures", Paper presented at the Conference on "Security Flashpoints: Oil, Islands, Sea Access and Military Confrontation" at UN Plaza- Park Hyatt Hotel, New York, on February 7-8, 1997.

Nguyễn, N., Unpublished Document, PhD Thesis in History, "Quá trình Xác lập Chủ quyền của Việt Nam tại Quần đảo Hoàng Sa và Trường Sa", Hồ Chí Minh National University, 2002.

Nossum, J.H., Straight Baselines of Vietnam, Oslo: Centre for Development and the Environment (SUM), Thesis series, No. 12, 2000, online at http://www.prio.no/page/Project_detail//9244/42561.html

Websites

Collection of Treaties on the Law of the Sea of UN website:

http://www.un.org/Depts/los/LEGISLATIONANDTREATIES

Energy Information Administration of the United States' Government:

http://www.eia.doe.gov/emeu/cabs/schina.html

BIBLIOGRAPHY

FAO: http://www.fao.org/fi/statist/statist.asp

Georgetown University: http://www.ll.georgetown.edu/intl/intl.html

International Peace Research Institute of Norway: http://www.prio.no/research/asiasecurity

Ministry of Foreign Affairs of the Philippines: http://www.dfa.gov.ph/news/pr/pr2004/sep/pr524.htm

Mostly *Avalon Project* Documents from the Yale Law School:

http://net.lib.byu.edu/~rdh7/wwi/hague.html

Peace Palace Library: http://www.ppl.nl

RAVE (Dusseldorf): http://www.jura.uni-duesseldorf.de/rave/e/englhome.asp

The American Society of Iinternational Law Research Tools:

http://www.asil.org/resources/index.html

The ASEAN Secretariat: http://www.aseansec.org/16646.htm

The Comparative Connection, Pacific Forum's Quarterly Electronic Journal on East Asian Bilateral Relations: http://www.csis.org/pacfor/ccejournal.html

The Global Security Organisation: http://www.globalsecurity.org/military/world/war/Spratlys-maps.htm

The Timor Sea Office: http://www.timorseaoffice.gov.tp/enindex.htm

The Vietnam Project of Texas Tech University: http://www.vietnam.ttu.edu/

The World Factbook of the Central Intelligent Agency of the United States' Government: http://www.cia.gov/cia/publications/factbook/geos/pf.html

The Www Virtual Library of the Australian National University: http://www.middlebury.edu/SouthChinaSea/

The United Nations: www.un.org

University of British Columbia: http://faculty.law.ubc.ca/scs/

University of Durham: http://www-ibru.dur.ac.uk